No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

TANIA FLORES DE BRENES individually, and as Executor, Administrator, or Personal Representative of the Estate of Eric Antonio Brenes, decedent; and CLAUDIA CROW, individually and as Executor, Administrator, or Personal Representative of the Estate of ALFONSO G. WONG-VALLE and MARIA WONG-VALLE, decedents,

Petitioners,

vs.

TRANSPORTES AEREOS NACIONALES, S.A., a foreign corporation, and SERVICIO AEREO DE HONDURAS, S.A., a foreign corporation,

Respondents.

On Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida, Third District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioners' rights under the Due Process clause of the Fourteenth Amendment were violated when an intermediate Florida court of appeal reversed their money judgments on the ground that Nicaraguan law did not permit recovery of moral damages in their wrongful death actions, in the face of a unanimous advisory opinion of the Supreme Court of Nicaragua and an Interpretative Law duly enacted by the National Assembly of Nicaragua plainly declaring that Nicaraguan law *did* permit recovery of moral damages in their actions.

2. Whether, in simply ignoring a unanimous advisory opinion of the Supreme Court of Nicaragua and an Interpretative Law duly enacted by the National Assembly of Nicaragua plainly declaring that Nicaraguan law permitted the recovery of moral damages in the petitioners' wrongful death actions, an intermediate Florida court of appeal violated the federal principle of comity known as the "act of state doctrine" in reversing the petitioners' money judgments on the ground that Nicaraguan law did *not* permit recovery of moral damages in their actions.

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The petitioners, Tania Flores de Brenes, individually and as executor, administrator, or personal representative of the estate of Erick Antonio Brenes, decedent, for herself and on behalf of the decedent's survivors, and Claudia Crow, individually and as executor, administrator, or personal representative of the estates of Alfonso G. Wong-Valle and Maria Wong-Valle, decedents, for herself and on behalf of the decedents' survivors, respectfully pray that a writ of certiorari issue to review the decision and judgment of the District Court of Appeal of Florida, Third District, entered in this proceeding on March 9, 1993.

OPINIONS BELOW

The decision of the District Court of Appeal of Florida, Third District, is reported at 625 So.2d 4, and appears in the appendix at pages 1a-6a. The decisions of the Florida Supreme Court denying review of the intermediate appellate court's decision are reported at 632 So.2d 1025, and appear in the appendix at pages 10a-11a.

JURISDICTION

The decision and judgment of the District Court of Appeal of Florida, Third District, was entered on March 9, 1993. Timely motions for rehearing were filed, which were denied on November 3, 1993. The limited review jurisdiction of the Florida Supreme Court was thereafter timely invoked, and review was denied on February 11, 1994. This petition for writ of certiorari was filed within

90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, Section 1, United States Constitution (emphasis supplied):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

At a time when the government of the United States is doing its utmost to encourage and support the fledgling democratic institutions of the Republic of Nicaragua, the decision which we seek to have reviewed here has utterly contemned the authority of all three branches of its government – and provoked a formal protest by the Nicaraguan government to the government of the United States (App. 60a-63a). The decision is, most respectfully, the single most incomprehensible judicial act which undersigned counsel has witnessed in nearly 20 years of practice in the appellate courts of this nation. It affected 34 different wrongful death actions brought by various

Nicaraguan citizens (most of whom lived in Nicaragua, and some of whom resided in Florida) against Honduran defendants for an aviation disaster which occurred on a Honduran mountainside in October, 1989.

In the two cases which are the subject of this petition, which were consolidated with the others, the parties stipulated that the actions were governed by Nicaraguan law and that the defendants would not contest liability for compensatory damages recoverable under Nicaraguan law. The defendants also stipulated that the petitioner in the De Brenes case had suffered $1,000,000.00 in economic damages and $1,500,000.00 in intangible damages (or, as they are known under Nicaraguan law, "moral damages"), but reserved the right to contest the recoverability of moral damages under Nicaraguan law. An evidentiary hearing was held to determine this question, at which the trial court received expert opinion testimony.

The plaintiffs' expert, Dr. Alejandro Montiel Arguello, was eminently qualified. He had been an attorney in Nicaragua for 53 years, and was presently a Judge on the Interamerican Court of Human Rights – a court established by the Organization of American States, whose judges were selected by the ministers of foreign affairs of the OAS' member states. He also served as a consultant to the Foreign Affairs Ministry in Nicaragua. In the past, he had served for one year as permanent ambassador to the United Nations on behalf of Nicaragua; for ten years as the Secretary of State of Nicaragua; for two years as Nicaragua's ambassador to the Republic of Panama; and for an undisclosed period of time as Nicaragua's ambassador to France. He had also served for 10 years as a Justice of the Supreme Court of

Nicaragua, and was Chief Justice of that court for two years. During his lengthy tenure on the Supreme Court, he participated in two of the three decisions upon which the parties were principally relying. (Tr. pp. 128, 213-23).

Dr. Montiel had also authored the following books: "The Supreme Court and International Law," published in Managua in 1967; "The Manual of International Law," published in Managua in 1969, in Costa Rica in 1976, and in Guatemala in 1982; a four-volume treatise entitled "Civil Jurisprudence in Nicaragua," published in Managua in 1971-1977; "The Manual of Private International Law," published in Managua in 1974; a four-volume treatise entitled "Manual of International Laws," published in Managua; and articles concerning the "Law of the Sea," published in Managua in 1971. Dr. Montiel's four-volume treatise on Nicaraguan Civil Jurisprudence contains a summary of all of the decisions handed down by the Supreme Court of Nicaragua since 1913.[1] (Tr. pp. 215-17).

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[1] In contrast, the defendants' expert, Dr. Uriel Mendieta Gutierrez, was a practicing attorney in Nicaragua with a commercial civil practice, who had served as a Justice on the Nicaraguan Supreme Court for four years, between 1974 and 1978; he was the vice-president of that court at the time he retired in 1978 for political reasons. He did not participate in any of the Supreme Court decisions upon which the parties were relying at trial. Although he had been involved in "pretty many trials," his experience with "accident litigation" was limited to representing defendants in traffic violation cases. He had published two articles – one concerning the possession of real property, and one concerning divorce under international law – and had written nothing on the availability of moral damages under Nicaraguan law. He was retained by the defendants three weeks before trial. (Tr. pp. 62-68, 100, 129-30).

The trial court accepted Dr. Montiel's opinions on the subject; ruled that moral damages were recoverable in the actions under Nicaraguan law; and entered a judgment in the De Brenes case in the full amount of the plaintiff's stipulated damages. In the related Crow case, a jury awarded economic damages of $144,000.00 and moral damages of $1,494,000.00 to children who had lost both of their parents in the disaster, and judgment was entered on that verdict. The defendants appealed both judgments to the District Court of Appeal of Florida, Third District, where the appeals were consolidated for all appellate purposes.

In their initial brief (served on August 14, 1992), the defendants argued that, contrary to Dr. Montiel's eminently qualified expert opinions on the subject, (1) moral damages were *not* recoverable under the general damage provision of the Civil Code of Nicaragua, Article 2509; (2) the Penal Code of Nicaragua provided for the recovery of damages in a quasi-criminal (or tort) action *only* from a person who has been convicted of a crime; and (3) the acquittal of the defendants' agents from criminal charges by the Honduran courts *relieved* them of civil liability for moral damages under the Penal Code.[2]

The defendants also argued that the trial court's ruling should be reviewed *de novo* as a question of law,

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[2] Curiously, the second and third positions were asserted notwithstanding that the defendants' own expert had admitted at trial that, apart from Article 46 of the Penal Code itself (which says no such thing), there is not a single piece of paper in Nicaragua which says such a thing (Tr. pp. 181-83).

rather than as a question of fact requiring expert testimony. And the due process clause of the Fourteenth Amendment was squarely invoked as a constraint upon the court of appeal's power to resolve the legal question before it:

> A state court violates a litigant's due process rights under the Fourteenth Amendment of the United States Constitution when its construction of foreign law "contradict[s] the 'clearly established' law" of the foreign jurisdiction and such law "has been brought to the court's attention." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 731 . . . (1988).

(Appellants' initial brief, p. 22).

Apparently dismayed by these arguments, knowing that the court of appeal lacked facility in the Spanish language, and convinced that the court of appeal lacked the necessary expertise to resolve the question properly under Nicaraguan law, persons sympathetic to the plaintiffs' position requested the Chief Judge of the Criminal Court in Managua to seek an advisory opinion on the subject from the Supreme Court of Nicaragua. On October 5, 1992, the Supreme Court of Nicaragua, acting under its constitutional authority to do so, issued an advisory opinion declaring that the law of Nicaragua provides for the recovery of moral damages in cases like the instant cases (App. 12a-15a). By a vote of 9-0, the Justices declared (1) that moral damages are recoverable under the general damage provision of the Civil Code of Nicaragua, Article 2509; (2) that, in accidents involving public transportation, moral damages are recoverable under Articles 46 and 48 of the Penal Code of Nicaragua,

which deal with civil liability for both crimes and "quasi-crimes" (or torts); and (3) that the acquittal of an agent in a criminal action does not relieve the principal from civil liability in an action to redress a quasi-crime, and that moral damages are recoverable in such an action under these provisions of the Penal Code.

The plaintiffs filed their appellees' briefs in the consolidated appeals two months later, on December 8, 1992. Because the defendants were certainly correct that the due process clause required that the result in the case not contradict the "clearly established law" of Nicaragua, the plaintiffs did not challenge this constitutional premise. And because the parties had stipulated that Nicaraguan law applied, there was no need to remind the court of the settled principles of international comity. The plaintiffs therefore argued that, according to a prior decision of the court of appeal, the trial court's determination of the law of Nicaragua was essentially a question of fact which could not be overturned on appeal because it was supported by competent expert opinion testimony.

The plaintiffs also supported the trial court's ruling with an extensive analysis of the various provisions of the Nicaraguan Civil and Penal Codes, as well as earlier decisions of the Nicaraguan Supreme Court and the published opinions of various treatise writers which demonstrated the propriety of the trial court's conclusion. The plaintiffs also requested the court to take judicial notice of the Nicaraguan Supreme Court's advisory opinion, as it was required to do by § 90.203, Fla. Stat.; and they argued in their brief that the advisory opinion was conclusive of the propriety of the trial court's ruling. In their reply brief, the defendants contended that the

Nicaraguan Supreme Court's advisory opinion could safely be ignored because only the Nicaraguan National Assembly had the power to "officially interpret the law" under the Nicaraguan Constitution.

A three-judge panel of the court of appeal ultimately reversed the plaintiffs' awards of moral damages in both the De Brenes case and the Crow case (App. 1a-6a). First, the panel held that it was entitled to review the trial court's ruling as a question of law, and simply overruled another panel's prior decision to the contrary. And then – notwithstanding that Florida law provides for the recovery of intangible damages in wrongful death actions and relieves no persons of civil tort liability simply because they have been acquitted of criminal charges arising out of the incident, so there was no public policy of Florida which would have justified a refusal to follow Nicaraguan law – the panel held (1) that moral damages are *not* recoverable under Article 2509 of the Civil Code of Nicaragua; (2) that the Penal Code of Nicaragua provides for the recovery of moral damages *only* from a person who has been convicted of a crime; and (3) that the acquittal of an agent from criminal charges *relieves* the principal of civil liability for intangible damages under the Penal Code. Remarkably, the panel did not even mention the existence of the Nicaraguan Supreme Court's advisory opinion, much less explain why it felt it was competent to decide the substance of Nicaraguan law in a manner squarely contrary to each and every point in that authoritative opinion.

That the court of appeal utterly flouted the authority of the Nicaraguan Supreme Court is undeniable, as a simple side-by-side comparison of the two opinions –

which we will set out in the "Reasons" section which follows – will plainly reveal. In ignoring the Nicaraguan Supreme Court's explanation of Nicaraguan law, the court of appeal apparently accepted the defendants' argument that the opinions of Nicaragua's highest judicial authority need not be respected because, under Nicaragua's Constitution, the only branch of government given express authority to "officially interpret the law" is the legislative branch, the National Assembly. Whatever justification that argument might have provided evaporated, however, when, in quick response to the court of appeal's decision, the Nicaraguan National Assembly enacted an "Interpretative Law," duly signed into law thereafter by the President of the Republic of Nicaragua, which was consistent in every particular with the Supreme Court's prior explanation of Nicaraguan law (App. 16a-19a).

In that "Authentic Interpretation," Law No. 157, the National Assembly declared, as had the Supreme Court, (1) that moral damages are recoverable under the general damage provision of the Civil Code of Nicaragua, Article 2509; (2) that, in accidents involving public transportation, moral damages are recoverable under Articles 46 and 48 of the Penal Code of Nicaragua, which deal with civil liability for both crimes and "quasi-crimes"; and (3) that the acquittal of an agent in a criminal action does not relieve the principal from civil liability in an action to redress a quasi-crime, and that moral damages are recoverable in such an action under these provisions of the Penal Code. The Interpretative Law also explained an additional error made by the court of appeal in a miscellaneous aspect of the reasoning stated in its decision.

This Interpretative Law was brought to the court of appeal's attention in a timely motion for rehearing and motion for rehearing en banc (App. 20a-59a). Because the court of appeal's decision was not final at the time these motions were filed, it was permissible to raise this post-decision development by motion for rehearing, and the court of appeal was required to entertain argument upon it. *See City of Miami v. Harris*, 490 So.2d 69 (Fla. 3d DCA 1986) (where United States Supreme Court rendered decision overruling prior precedent while motion for rehearing was pending, court of appeal was required to withdraw its initial decision affirming judgment, grant rehearing, and reverse judgment), *cert. denied*, 479 U.S. 1031 (1987).[3]

In these motions, the plaintiffs reminded the court of appeal of what the defendants themselves had asserted in their initial brief – that a state court violates a litigant's due process rights under the Fourteenth Amendment of the United States Constitution when its construction of foreign law "contradict[s] the 'clearly established' law" of the foreign jurisdiction and such law "has been brought to the court's attention." And the motions asserted that, given the advisory opinion of the Nicaraguan Supreme

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[3] *See also Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla. 1987) (where decision simply interprets existing law and neither changes nor modifies it, it must be applied to existing cases whose disposition has not become final); *Hampton v. A. Duda & Sons, Inc.*, 511 So.2d 1104 (Fla. 5th DCA 1987) (Supreme Court decision filed while post-decision motion is pending must govern ultimate disposition of the appeal).

Court and the Interpretative Law of the National Assembly of Nicaragua, the result reached by the panel plainly violated the plaintiffs' due process rights and had to be corrected. The motions also urged at length that settled principles of the doctrine of international comity required the same correction.

The defendants responded by arguing that the National Assembly's Interpretative Law was an impermissible *ex post facto* law – to which the plaintiffs replied that it was a permissible explanation of existing law (upon which the defendants had earlier insisted when arguing that only the National Assembly had the constitutional authority to interpret Nicaraguan law), rendered under the authority of Section II, Article IV of the Preliminary Title to the Nicaraguan Civil Code, which reads (in English translation) as follows:

> The law may provide only for the future and shall never have a retroactive effect.
>
> However, laws which are limited to interpreting the meaning of other laws shall be understood as incorporated into such laws; but said laws shall not affect in any manner whatsoever judicial decisions which are final in the time in between.

Because the court of appeal's decision was not yet final (and because the judgment which would be required upon ultimate issuance of the mandate had yet to be entered), this provision should have been dispositive of the conclusive effect of the Interpretative Law on the issue before the court of appeal. Nevertheless, the plaintiffs' post-decision motions were summarily denied (with one judge dissenting to the denial of the motion for

rehearing en banc), with no mention of the Interpretative Law which the Nicaraguan National Assembly had enacted in direct response to the court of appeal's erroneous decision (App. 7a-8a). The court of appeal also denied the plaintiffs' motions that the decision be certified to the Florida Supreme Court for further review (App. 9a).

In Florida, in the absence of a certification by an intermediate court of appeal, the Supreme Court's authority to review a decision of such a court is extremely limited in the context presented by the instant case. Jurisdiction exists only to review a decision "that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Article V, Section 3(b)(3), Florida Constitution. *See Jenkins v. State*, 385 So.2d 1356 (Fla. 1980); *Reaves v. State*, 485 So.2d 829 (Fla. 1986); *Paddock v. Chacko*, 553 So.2d 168 (Fla. 1989).

In effect, the intermediate courts of appeal control the Florida Supreme Court's jurisdiction by the manner in which they write their opinions; and because the court of appeal's decision failed to disclose the existence of either the Nicaraguan Supreme Court's advisory opinion or the Nicaraguan National Assembly's Interpretative Law (and, of course, because there was no Florida decision holding that moral damages are recoverable under Nicaraguan law), the plaintiffs were given not even a toehold upon which to support invocation of the Supreme Court's limited jurisdiction. Nevertheless, because of the Florida Supreme Court's decision in *The Florida Star v. B. J. F.*, 530 So.2d 286 (Fla. 1988), the plaintiffs were required to exhaust that potential remedy,

notwithstanding its futility, before petitioning this Court for certiorari review of the court of appeal's decision.

Shortly after the notices invoking the Florida Supreme Court's jurisdiction were filed, the Republic of Nicaragua, through its Attorney General, moved the Florida Supreme Court for leave to intervene to speak for the numerous Nicaraguan citizens deprived of their recoveries by the court of appeal's decision who were not parties to the proceeding, and to ask that its governmental institutions and laws be respected by the courts of Florida. This motion was denied, with leave to file an amicus brief on the merits only if the Court accepted the case for review. Predictably, however, the Florida Supreme Court determined that it had no jurisdiction to review the decision, and review was summarily denied (App. 10a-11a). This timely petition for writ of certiorari followed.

We understand that the Republic of Nicaragua will request leave to appear in this Court as an amicus curiae in support of the petition for writ of certiorari. And, as we noted at the outset, the Republic of Nicaragua has filed a formal protest with the government of the United States concerning the court of appeal's refusal to respect the due process rights of the numerous Nicaraguan citizens affected by its decision, as well as its obvious flouting of the settled principles of international comity, and requesting that the executive branch assist it in restoring its citizens' rights in this Court (App. 60a-63a).

REASONS FOR GRANTING THE WRIT

1. The petitioners' due process rights were plainly violated by the court of appeal's studied refusal to follow Nicaraguan law, as declared by an advisory opinion of the Supreme Court of Nicaragua and an Interpretative Law duly enacted by the National Assembly of Nicaragua.

This Court has frequently observed that a state court's misconstruction of the law of a foreign state violates the due process clause of the Fourteenth Amendment to the United States Constitution if the "misconstruction . . . contradict[s the] law of the other State that is clearly established and that has been brought to the court's attention." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 731 (1988). *Accord Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981).[4]

Although we could demonstrate that the court of appeal's decision plainly contradicts established Nicaraguan law with a detailed examination of the relevant provisions of the Nicaraguan Civil, Penal, Commercial and Procedural Codes, there would appear to be no need to trouble the Court with those details here, since

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[4] The fact that the numerous plaintiffs affected by the court of appeal's decision were citizens of Nicaragua (only some of whom resided in the United States), is of no moment; once Florida opened its courts to them for the adjudication of their claims, they (as well as the defendants) were clearly entitled, as all aliens are, to the protection of the due process clause. *See, e. g., Mathews v. Diaz*, 426 U.S. 67 (1976); *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *United States v. Pink*, 315 U.S. 203 (1942).

the relevant provisions are explained with perfect consistency in the advisory opinion of the Nicaraguan Supreme Court and the Interpretative Law enacted by the Nicaraguan National Assembly.[5] For our limited purposes here, those authoritative declarations should be sufficient because this Court has also squarely held that an official declaration of foreign law, made by an institution of the foreign government having the power to interpret the existing law, "is conclusive" on courts of this nation when deciding a question of that foreign government's law. *United States v. Pink*, 315 U.S. 203, 220 (1942).[6]

That the court of appeal utterly flouted the authority of the Nicaraguan Supreme Court is undeniable – as a simple side-by-side comparison of the two opinions, quoted verbatim (and in English translation), plainly reveals:

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[5] We will, of course, detail the relevant code provisions in our brief on the merits, if the Court should agree to hear the case. In the meantime, the Court will find a detailed discussion of the relevant code provisions in the plaintiffs' motion for rehearing, which is included in the appendix at pages 25a-44a.

[6] Ironically, in *U.S. v. Pink*, the Court gave "conclusive" effect to a declaration of "The People's Commissariat for Justice" of the Soviet Union on a question of Soviet law involving the nationalization of assets within the United States. In the instant cases, the court of appeal simply ignored the declarations of all three branches of the newly-formed democratic government of a nation which had recently thrown off the shackles of Communism with the aid of the United States government. Surely, there are far better reasons for applying the rule of *Pink* to the instant cases than there were in *Pink* itself.

The Nicaraguan Supreme Court's Opinion

In Articles 2509 and the subsequent, the Civil Code of Nicaragua establishes civil liability for damages in their entirety, without exclusion. Meaning that it covers property damages as well as moral damages. The law has no provision on damage issues limiting it to property damages exclusively, wherein moral damages are excluded. To elaborate on this subject, refer to judgment date 8-12-1965, case Burgos Chamorro vs. Ferrocarril del Pacifico de Nicaragua.

The court of appeal's opinion

No provision of the civil code provides for the recovery of moral damages. Appellees rely on Article 2509, the basic civil-code provision dealing with the indemnification of damages and losses. According to Article 2509, "[e]very one who by intentional misconduct, fault, negligence or imprudence, or by a malicious act causes injury to another is obligated to repair it along with the harms." It is the appellees' contention that because Article 2509 does not differentiate between compensatory and moral damages, moral damages are implicitly recoverable. That argument, however, ignores the civil-code prohibition against presuming legal obligations not expressly set forth under the code. Article 2509 does not mention moral damages; it provides only for the compensation of pecuniary loss.

In the chapter referring to crimes and quasi crimes, the Nicaraguan Civil Code establishes civil liability for damages caused by punishable acts, and in Article 3106 C. [Civil] it mentions that in an accident involving public transportation, civil liability will always abide by the Criminal Code. Article 2 of the Criminal Code describes as punishable an act punished by law, caused by negligence, unskill, negligence or violation of laws or regulations; and that any person criminally liable has civil liabilities also. (Article 34 Pn. [Penal]). The Criminal Code of Nicaragua, in the Chapter on Rules to determine Civil Liability, Article 46, stipulates on the payment of property and moral damages caused by a punishable act. Dependent parties may file claims for property and moral damages pursuant to Articles 46 and 48 Pn. Article 10 Pn. indicates that a damaging act or omission of an agent for whose actions a person is responsible by virtue of a civil relationship binding

Because the flight crew was acquitted of all criminal charges in connection with the plane crash, plaintiffs' claims are governed by the civil code. . . . Although the Nicaraguan legislature enacted a new penal code in 1974 which expressly provided for an award of moral damages after a criminal conviction, Article 2509, the Civil Code, was not amended to provide recovery for such damages.

> him/her to such agent, constitutes a quasi crime. Civil liability proceeding from a quasi crime is not annulled as [a consequence] of a dismissal of the criminal liability of the agent. Said civil liability allows for charges on property and moral damages as well. Refer to Engracia Martinez vs. Rafael Cabrera & Co., judgment date 12/21/1957; Vivas vs. Esso Standard Oil, judgment date 8-17-1949; Cuadra Mendoza vs. Camilo Barberna deShon & Co., judgment date 12-9-1969.

Most respectfully, that the court of appeal read Nicaraguan law exactly contrary to the manner in which the Nicaraguan Supreme Court authoritatively stated it is simply beyond debate.

In ignoring the Nicaraguan Supreme Court's explanation of Nicaraguan law, the court of appeal apparently accepted the defendants' argument that the opinions of Nicaragua's highest judicial authority need not be respected because, under Nicaragua's Constitution, the only branch of government given express authority to "officially interpret the law" is the National Assembly. Whatever justification that argument might have provided evaporated, however, when, in quick response to the court of appeal's decision, the Nicaraguan National

Assembly enacted an Interpretative Law which was consistent in every particular with the Supreme Court's prior explanation of Nicaraguan law.

The relevant portions of that "Authentic Interpretation," Law No. 157, read as follows (in English translation):

> Art. 1 The following is the authentic interpretation of Arts. 2509, 1837, 1838, 1865 and 3601 of the Civil Code, and paragraph 2 of Art. 1123 of the Code of Civil Procedure:
>
> a) civil responsibility for the damages and harms referred to in Art. 2509 C. and following (Title VIII, Sole Chapter on Crimes and Quasicrimes) is for damages in their entirety, without exclusion, meaning both material damages and moral damages. There is no provision whatsoever in the law that limits damages strictly to material damages or that excludes moral damages.
>
> If there were any doubt whatsoever, Art. 46 of the Penal Code of 1974, by providing the Rules to Determine Civil Responsibility, establishes " . . . indemnification for the material and moral damages" and, if there exists any other provision which may be contrary to this precept of the Penal Code, it was expressly or tacitly abrogated by the provisions of Art. 564 of the same Code.

Notwithstanding, a review of the current Nicaraguan legislation reflects that there is no express provision of the law which is contrary to indemnification for all damages, material or moral, arising from a crime or quasi-crime comprehended in the Penal Code or in the Civil Code.

. . . .

c) regarding Arts. 3106 C. and 1123 Pr., paragraph 2, as to cases for damages caused as a consequence of an accident involving a vehicle in public transportation, the carrier shall always be responsible, without exception, for the indemnification arising from the quasi-crime, as defined in Art. 10 Pn., which by its own terms produces only civil responsibility.

Consequently, from these provisions, in full coincidence with the terms of Art. 392 C.C., it must be concluded that civil responsibility of public transportation companies arising from a crime or quasi-crime is not extinguished by the acquittal of an agent from penal responsibility, nor even by the lack of a criminal prosecution when only civil responsibility is prosecuted.

This interpretation is also consistent with the provisions of Art. 52 Pn. which expressly addresses relinquishment of the criminal

> action to prosecute only the civil action "for the reparation of the damage caused["], in the same inclusive manner of Art. 2509 C., without specifying or excluding material or moral damages. Therefore, the civil action is not precluded in the case of an acquittal in a penal proceeding, or in the absence of a conviction which declares the criminal responsibility of the culpable party for such indemnification.

Most respectfully, that the court of appeal read Nicaraguan law exactly contrary to the manner in which the Nicaraguan National Assembly authoritatively stated it is simply beyond debate. And because the court of appeal's decision squarely contradicts the law clearly established by both of these plainly authoritative declarations, each of which was brought to the court's attention in a timely fashion and in no uncertain terms, it ought to be beyond debate here that the court of appeal plainly violated the petitioners' due process rights with its contradictory construction of Nicaraguan law.

There is far more involved here than the simple failure of justice in a case or two. The court of appeal's decision affected not merely the two petitioners here; it deprived *scores* of Nicaraguan citizens of substantial damage recoveries to which they were plainly entitled under Nicaraguan law in at least 34 different wrongful death actions. The reach of the decision therefore goes far beyond its four corners, and violates the due process rights of numerous persons who were not even parties to

the appeal in which they were deprived of those rights. The decision also provoked an angry response by the Nicaraguan government in the form of a formal diplomatic protest, and it may therefore imperil continuing friendly relations between the two governments at an exceedingly delicate point in their new relationship.

Surely, if an intermediate appellate court in Nicaragua had baldly flouted the authority of both this Court and Congress on a question of United States law, deprived scores of United States citizens of property rights to which they were plainly entitled under United States law, and provoked a diplomatic protest by the government of the United States, this Court would expect the Nicaraguan Supreme Court to review the decision and set the cases aright. Most respectfully, unless the due process clause is to amount to no more than an empty shibboleth in the instant cases, this Court should do no less.

2. The federal principle of comity known as the "act of state doctrine" was plainly violated by the court of appeal's studied refusal to follow Nicaraguan law, as declared with respect to the instant litigation by an advisory opinion of the Supreme Court of Nicaragua and an Interpretative Law duly enacted by the National Assembly of Nicaragua.

We also respectfully submit that the federal principle of comity known as the "act of state doctrine" was plainly violated by the court of appeal's studied refusal to follow Nicaraguan law, as explicitly declared with respect to the instant litigation by an advisory opinion of the Supreme

Court of Nicaragua and an Interpretative Law duly enacted by the National Assembly of Nicaragua. The act of state doctrine derives from " 'the highest considerations of international comity and expediency,' " and has been faithfully applied by this Court over the decades because of " 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *W. S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International*, 493 U.S. 400, 404 (1990), *quoting Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918), and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

The classic statement of the doctrine is this: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Banco Nacional de Cuba, supra* at 416, *quoting Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). The doctrine " 'requires . . . that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision[,]' " because " '[t]o permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.' ' " *Banco Nacional de Cuba, supra* at 417-18, *quoting Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918), and *Underhill, supra* at 303-04.

And while the doctrine has most frequently been applied where the title to property is at stake, its reach is far broader:

> An act of state has been said to be any governmental act in which the sovereign's interest qua sovereign is involved. "The expression 'act of State' usually denotes 'an executive or administrative exercise of sovereign power by an independent State or potentate, or by its or his duly authorized agents or officers.' The expression, however, is not a term of art, and it obviously may, and is in fact often intended to, include legislative and judicial acts such as a statute, decree or order, or a judgment of a superior Court." Mann, The Sacrosanctity of the Foreign Act of State, 59 LQ Rev 42 (1943).

Banco Nacional de Cuba, supra at 445 n. 3 (J. White, dissenting).

A similar principle is also inherent in the rule of *United States v. Pink*, 315 U.S. 203, 220 (1942), upon which we have previously relied, which holds that an official declaration of foreign law, made by an institution of the foreign government having the power to interpret the existing law, "is conclusive" on courts of this nation when deciding a question of that foreign government's law. It is also settled that a state court's violation of the act of state doctrine presents a federal question which is reviewable by certiorari in this Court. *Banco Nacional de Cuba, supra* at 424-27.

While the doctrine was not explicitly invoked by its technical appellation below, reliance upon the doctrine was clearly implicit in the plaintiffs' brief, in which we

insisted that the advisory opinion of the Nicaraguan Supreme Court was conclusive of the legal question before the court. Thereafter, when the court of appeal ruled against the plaintiffs on the moral damages issue for the very first time in the litigation, and the National Assembly of Nicaragua responded immediately by enacting the Interpretative Law insisted upon by the defendants, the general principles of comity (of which the act of state doctrine is simply a particular expression) were explicitly invoked in our motions for rehearing and rehearing en banc, where we argued at length that the authoritative act of the National Assembly simply had to be respected and followed by the court of appeal. Moreover, the doctrine clearly has its roots in the due process clause, which was explicitly invoked at every stage of the proceeding by all parties below.

We therefore believe that the federal question presented by the court of appeal's studied refusal to afford any respect whatsoever to these authoritative acts of the government of Nicaragua, made in connection with the very cases presently before the Court, was fairly preserved for review here. And because our demonstration of the court of appeal's violation of the due process clause ought to be sufficient to demonstrate that the court of appeal plainly violated the principle of comity known as the act of state doctrine as well, there should be no need for us to make a separate demonstration of that additional, obvious violation of federal law here. The importance of the issue should also be sufficiently obvious as to require no reiteration here. We respectfully request an opportunity to brief the court of appeal's violation of both aspects of federal law on the merits.

CONCLUSION

For all of these reasons, it is respectfully urged that a writ of certiorari should issue to review the decision and judgment of the District Court of Appeal of Florida, Third District.

Respectfully submitted,

JOEL D. EATON, ESQ.
(Counsel of Record)

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT
OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1993

TRANSPORTES AEREOS NACIONALES, S.A., a foreign corporation and SERVICIO AEREO DE HONDURAS, S.A., a foreign corporation,	**	CASE NOS. 92-925 92-1408
Appellants,	**	
vs.	**	
TANIA FLORES DE BRENES, individually and as Executor, Administrator, or Personal Representative of the Estate of ERICK ANTONIO BRENES, Decedent, for herself and on behalf of the Decedent's survivors, and CLAUDIA CROW, for herself and as Executor, Administrator or Personal Representative of the Estates of ALFONSO G. WONG-VALLE and MARIA WONG-VALLE, deceased, et al.	**	
Appellees.	**	

Opinion filed March 9, 1993.

Appeals from the Circuit Court for Dade County, Ronald M. Friedman, Judge.

Condon & Forsyth and Desmond T. Barry, Jr. and Marilyn P. O'Mara (New York); Steel Hector & Davis and Thomas Scott and Adalberto Jordan; Thornton, David, Murray, Richard & Davis and John M. Murray, for Appellants.

Speiser, Krause, Madole & Mendelsohn, Mata (Texas); Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin and Joel D. Eaton, for Appellees.

Before SCHWARTZ, C.J., and FERGUSON and LEVY, JJ.

FERGUSON, Judge.

Transportes Aereos Nacionales, S.A., and Servicio Aereo de Honduras (collectively TAN-SAHSA), the defendants in two wrongful death actions, appeal from judgments awarding moral damages for non-economic harm.

In October 1989, a Boeing 727 operated by TAN-SAHSA crashed in Tegucigalpa, Honduras causing the death of 127 passengers and four crew members. The captain and first officer of the craft survived the accident. They were acquitted of criminal charges filed by Honduran authorities.[1] Subsequently, thirty-four wrongful death actions were filed against TAN-SAHSA in the circuit court for Dade County. For pre-trial purposes, the

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[1] According to the appellants, in Latin America the police routinely arrest and file criminal charges against persons involved in fatal accidents. Such charges, however, rarely result in convictions and sentences. *See* K. Karst, *Latin American Legal Institutions: Problems for Comparative Study* 256, 260-261 (1966) (discussion on the conviction rate in the criminal tribunal for homicide or negligently caused injuries).

trial court consolidated thirty-one of the thirty-four cases. The parties stipulated that the actions were governed by Nicaraguan law and that TAN-SAHSA would not contest liability for compensatory damages recoverable under Nicaraguan law. The only question in dispute was whether Nicaraguan law permits the recovery of moral damages in a wrongful death case.

Following an evidentiary hearing, the court ruled that both economic and moral damages could be claimed by the decedents' family members. In the *Brenes* action, the parties stipulated to $1,000,000 in compensatory damages and, if the trial court's interpretation of moral damages was affirmed on appeal, $1,500,000 in moral damages. In the *Crow* case, the jury awarded economic damages of $144,000 and moral damages of $1,494,000.

Standard of Review

A trial court's determination of foreign law is treated as a ruling on a question of law over which an appellate court exercises plenary review. *Kingston v. Quimby*, 80 So. 2d 455 (Fla. 1955). *See also Aboandandolo v. Vonella*, 88 So. 2d 282 (1956); C.T. Drechsler, Annotation, *Uniform Judicial Notice of Foreign Law Act*, 23 A.L.R.2d 1437, 1439 (1952) (determination of foreign law is a question of law under Uniform Act, changing common law which considered it an issue of fact).

Under section 90.202(4), Florida Statutes (1991), a court may take judicial notice of foreign law. The Law Revision Council Note to that section states that a Florida court complies with section 90.202 by taking judicial notice in a manner similar to that made under the federal

rules. The note then quotes Federal Rule of Civil Procedure 44.1, which provides that a court's determination of foreign law "shall be treated as a ruling on a question of law." Moreover, in reviewing, de novo, the trial court's determination, appellate courts are not limited to matters raised by the parties, but are encouraged to take an active role in ascertaining foreign law. *See* § 90.204(2), Fla. Stat. (1991); *Twohy v. First Nat'l Bank of Chicago*, 758 F.2d 1185, 1192 (7th Cir. 1985) ("trial and appellate courts are urged to research and analyze foreign law independently.")[2]

Nicaraguan Law

Nicaragua is a civil-law jurisdiction. It is axiomatic that in civil-law jurisdictions, lawmaking is exclusively the function of the legislature. *See, e.g.*, John Henry Merryman, *The Civil Law Tradition* 23-24 (1969) (only the legislature can make law); Albert Tate, Jr., *Civilian Methodology in Louisiana*, 44 Tul. L. Rev. 673 (1970) (the basis of all law is legislative). Statutes, enacted by the legislature, are the primary recognized source of law in civil-law tradition. Wilson, *Criminal Justice in Revolutionary Nicaragua*, 23 Miami Inter-American L.Rev. 269, 281-82 (1992) ("The study of civil law is the study of codes. No

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[2] *Guelman v. De Guelman*, 453 So. 2d 1159 (Fla. 3d DCA 1984), relied upon by the appellees for the proposition that an interpretation of foreign law is an issue of fact, is neither a correct statement of the law nor applicable to the question presented in this case. In *Guelman* the correct interpretation to be given the foreign law was litigated as a question of fact. Here, the court was requested, before trial, to take judicial notice of, and to apply the Nicaraguan Code, as a matter of law.

other source of law – judicial decisions, treatises, regulations, custom, or practice – carries the central significance of the code as the correct, organized, coordinated, unified expression of governing principles.").

Consistent with this principle of legislative supremacy, Nicaraguan law provides that all rights, duties, and liabilities must be expressly created by the legislature. Article 1835 of the Civil Code of Nicaragua states: "The obligations derived from the law are not presumed. Claims can only be based on those obligations expressly provided for in this Code or in the Special laws. . . . " Accordingly, moral damages cannot be awarded in a wrongful death case under Nicaraguan law unless such damages are expressly authorized by the legislature.

Because the flight crew was acquitted of all criminal charges in connection with the plane crash, plaintiffs' claims are governed by the civil code. No provision of the civil code provides for the recovery of moral damages. Appellees rely on Article 2509, the basic civil-code provision dealing with the indemnification of damages and losses. According to Article 2509, "[e]veryone who by intentional misconduct, fault, negligence or imprudence, or by a malicious act causes injury to another is obligated to repair it along with the harms." It is the appellees' contention that because Article 2509 does not differentiate between compensatory and moral damages, moral damages are implicitly recoverable. That argument, however, ignores the civil-code prohibition against presuming legal obligations not expressly set forth under the code. Article 2509 does not mention moral damages; it provides only for the compensation of pecuniary loss. In fact, the only civil-code definition of "injury" and "harm" is found

in Article 1865 which states "[i]ndemnification of damages includes not only the amount of the loss which has been suffered, but also that of the creditor's loss of profits. . . . "

Furthermore, the legislative history of Article 2509 suggests that at the time of its enactment, the legislature did not intend to provide for an award of moral damages. The historical note to Article 2509 states that the provision was derived from the Civil Code of Costa Rica, a jurisdiction that did not recognize moral damages. A. Brenes Cordoba, *Tratado De Los Obligaciones* 79 (1977 reprint of 1923 ed.). Although the Nicaraguan legislature enacted a new penal code in 1974 which expressly provided for an award of moral damages after a criminal conviction, Article 2509, the Civil Code, was not amended to provide recovery for such damages.

In view of our holding that no provision of Nicaraguan law permits the recovery of moral damages in these wrongful death cases, those portions of the judgments entered in *Brenes* and *Crow* that award moral damages cannot stand.

Reversed and remanded.

IN THE DISTRICT COURT
OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1993

NOVEMBER 3, 1993

TRANSPORTES AEREOS NACIONALES, S.A., etc., et al.,	**	
Appellants,	**	CASE NO.
vs.	**	92-925
	**	92-1408
TANIA FLORES DE BRENES, etc., et al.,	**	
	**	
Appellees.	**	

Upon consideration, appellees' motion for rehearing and Claudia Crow's joinder in motion for rehearing are hereby denied. Schwartz, C.J., and Ferguson and Levy, JJ., concur. Appellees' motion for rehearing en banc and Claudia Crow's joinder in motion for rehearing en banc are denied. Schwartz, C.J., and Hubbart, Nesbitt, Baskin, Ferguson, Jorgenson, Levy, Gersten and Goderich, JJ., concur. Cope, J., dissents. Barkdull, J. is recused.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By /s/ Illegible
Deputy Clerk

(SEAL)

IN THE DISTRICT COURT
OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1993

NOVEMBER 5, 1993

TRANSPORTES AEREOS NACIONALES, S.A., etc., et al.,	**	
Appellants,	**	CASE NO.
vs.	**	92-925
	**	92-1408
TANIA FLORES DE BRENES, etc., et al.,	**	
	**	
Appellees.	**	

Upon consideration, appellees' motion for certification and Claudia Crow's joinder in motion for certification are hereby denied. Schwartz, C.J., and Ferguson and Levy, JJ., concur.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By /s/ Illegible
Deputy Clerk

(SEAL)

SUPREME COURT OF FLORIDA

FRIDAY, FEBRUARY 11, 1994

TANIA FLORES deBRENES, ETC.,	*	CASE NO. 82,837
Petitioner,	*	DISTRICT COURT OF APPEAL, 3RD DISTRICT NO. 92-925 92-1408
v.	*	
TRANSPORTES AEREOS NACIONALES, S.A., ETC., ET AL.,	*	
Respondents.	*	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

MCDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur

A True Copy

TEST:

/s/ Sid J. White
Sid J. White (SEAL)
Clerk, Supreme Court

SUPREME COURT OF FLORIDA

FRIDAY, FEBRUARY 11, 1994

CLAUDIA CROW, ETC., ET AL.,	*	CASE NO. 82,831
Petitioner,	*	DISTRICT COURT OF APPEAL, 3RD DISTRICT NO. 92-925 92-1408
v.	*	
TRANSPORTES AEREOS NACIONALES, S.A., ETC., ET AL.,	*	
Respondents.	*	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

MCDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur

A True Copy

TEST:

/s/ Sid J. White
Sid J. White (SEAL)
Clerk, Supreme Court

[Coat of arms]

SUPREME COURT OF JUSTICE

CERTIFICATE

The undersigned Secretary of the Honorable Supreme Court of Justice hereby certifies the inquiry included herein and says verbatim the following:

Managua, October 5, 1992. Doctor German Vasquez C., Chief Judge of the Criminal Court. Managua. Dear Judge Vasquez.

In a letter dated 08-20-92, you mention the following: That if under Nicaraguan laws only property damages apply to bring suit, or if moral damages also, according to Article 46 of the Penal Code. And if to the effect of determining who may claim indemnization for determined damages, it corresponds to the legal dependents of the defendant, according to the Civil Code, pursuant to the precepts in Article 48 of the Penal Code and Article 288 of the Civil Code."

I have received instructions from the Judges of the Supreme Court of Justice to answer in the following manner:

In Articles 2509, and the subsequent, the Civil Code of Nicaragua establishes civil liability for damages in their entirety, without exclusion. Meaning that it covers property damages as well as moral damages. The law has no provision on damage issues limiting it to property damages exclusively, wherein moral damages are excluded. To elaborate on this subject, refer to judgment

date 8-12-1965, case Burgos Chamorro vs. Ferrocarril del Pacifico de Nicaragua.

In the chapter referring to crimes and quasi crimes, the Nicaraguan Civil Code establishes civil liability for damages caused by punishable acts, and in Article 3106 C. it mentions that in an accident involving public transportation, civil liability will always abide by the Criminal Code.

Article 2 of the Criminal Code describes as punishable, an act punished by law, caused by negligence, unskill, negligence or violation of laws or regulations; and that any person criminally liable has civil liabilities also. (Article 34 Pn).

The Criminal Code of Nicaragua, in the chapter on Rules to determine Civil Liability, Article 46, stipulates on the payment of property and moral damages caused by a punishable act. Dependent parties may file claims for property and moral damages pursuant to Articles 46 and 48 Pn.

Article 10 Pn indicates that a damaging act or omission of an agent for whose actions a person is responsible, by virtue of a civil relationship binding him/her to such agent, constitutes a quasi crime. Civil liability proceeding from a quasi crime is not annulled as [a consequence] of a dismissal of the criminal liability of the agent. Said civil liability allows for charges on property and moral damages as well. Refer to Engracia Martinez vs. Rafael Cabrera & Co., judgment date 12-21-1957; Vivas vs. Esso Standard Oil, judgment date 8-17-1949; Cuadra Mendoza vs. Camilo Barberena Deshon & Co., judgment date 12-9-1969.

This is in reply to your inquiry. ALFONSO VALLE PASTORA. SECRETARY. SUPREME COURT OF JUSTICE.

Let it also be recorded that the judgment issued by the Supreme Court of Justice, in this case, does not contain an adversary vote because the inquiry was disposed of by unanimous vote of all the Magistrates, Judges Orlando Corrales Mejía, Rafael Chamorro Mora, Ramón Romero Alonso, Alba Luz Ramos Vanegas, Rodrigo Reyes Portocarrero, Enrique Villagra Morales, Santiago Rivas Haslam, Adrían Valdivia Rodríguez.

By request of Doctor Alvaro Ramirez González, this was issued in the city of Managua, on the ninth day of December, nineteen hundred and ninety-two.

/Validated Rubber Stamp of Supreme Court/
ALFONSO VALLE PASTORA
SECRETARY
SUPREME COURT OF JUSTICE

MINISTRY OF FOREIGN AFFAIRS

CONSULAR DIVISION

The Ministry of Foreign Affairs of the Republic of Nicaragua hereby "CERTIFIES" that the preceding signature which says : ILLEGIBLE . ALFONSO VALLE PASTORA.

Is "GENUINE" and corresponds to the one used on this date by the SECRETARY OF THE SUPREME COURT OF JUSTICE IN NICARAGUA.

This Ministry shall not assume any liability as to the contents of the document.

Managua, December 10, 1992

/Rubber Stamp of Ministry of Foreign Affairs – Managua – Nicaragua/

/s/ illegible signature

Bergman Zúniga Pérez
Sub-Director Consular

NATIONAL ASSEMBLY

LAW No. 157

THE NATIONAL ASSEMBLY OF THE REPUBLIC OF NICARAGUA

In exercise of its powers

HAS DICTATED

The following:

AUTHENTIC INTERPRETATION OF

ARTICLES 2509, 1837, 1838, 1865, AND 3106 OF THE CIVIL CODE AND ARTICLE 1123(2) OF THE CODE OF CIVIL PROCEDURE

Art. 1 The following is the authentic interpretation of Arts. 2509, 1837, 1838, 1865 and 3601 of the Civil Code, and paragraph 2 of Art. 1123 of the Code of Civil Procedure:

a) civil responsibility for the damages and harms referred to in Art. 2509 C. and following (Title VIII, Sole Chapter on Crimes and Quasi-crimes) is for damages in their entirety, without exclusion, meaning both material damages and moral damages. There is no provision whatsoever in the law that limits damages strictly to material damages or that excludes moral damages.

If there were any doubt whatsoever, Art. 46 of the Penal Code of 1974, by providing the Rules to Determine Civil Responsibility, establishes " . . . indemnification for the material and moral damages" and, if there exists any other provision which may be contrary to this precept of the Penal Code, it was expressly or tacitly abrogated by the provisions of Art. 564 of the same Code.

Notwithstanding, a review of the current Nicaraguan legislation reflects that there is no express provision of the law which is contrary to indemnification for all damages, material or moral, arising from a crime or quasi-crime comprehended in the Penal Code or in the Civil Code.

b) the provision of Art. 1865 C. is not applicable to " . . . civil obligations arising from crimes or faults, which shall be governed by the provisions of the Penal Code", as established by Art. 1837 C., and neither is it applicable to the obligations arising from "acts or omissions involving guilt or negligence not punished by the law . . . ", which are subject to the provisions of Title VIII, Sole Chapter, as provided in Art. 1838 C.

Art. 1865 C. is applicable only to obligations arising from other types of contractual acts, debts or matters related to property.

c) regarding Arts. 3106 C. and 1123 Pr., paragraph 2, as to cases for damages caused as a consequence of an accident involving a vehicle in public transportation, the carrier shall always be responsible, without exception, for the indemnification arising from the quasi-crime, as defined in Art. 10 Pn., which by its own terms produces only civil responsibility.

Consequently, from these provisions, in full coincidence with the terms of Art. 392 C.C., it must be concluded that civil responsibility of public transportation companies arising

from a crime or quasi-crime is not extinguished by the acquittal of an agent from penal responsibility, nor even by the lack of a criminal prosecution when only civil responsibility is prosecuted.

This interpretation is also consistent with the provisions of Art. 52 Pn. which expressly addresses relinquishment of the criminal action to prosecute only the civil action "for the reparation of the damage caused["], in the same inclusive manner of Art. 2509 C., without specifying or excluding material or moral damages. Therefore, the civil action is not precluded in the case of an acquittal in a penal proceeding, or in the absence of a conviction which declares the criminal responsibility of the culpable party for such indemnification.

ch) according to Arts. 46 and 48 Pn., the persons legitimately entitled to claim material and moral damages are the persons with the right to claim support according to the pertinent provisions of the Civil Code and its amendments, whatever the case may be.

Art. 2 The present law shall enter in force from its publication by any means of mass communication, without prejudice to its publication in the Official Daily, The Gazette. So it be published.

Issued in the City of Managua in the Hall of Sessions of the National Assembly, on the twenty-third day of March of nineteen hundred and ninety three.

GUSTAVO TABLADA ZELAYA
PRESIDENT OF THE
NATIONAL ASSEMBLY (Seal)

FRANCISCO J. DUARTE
SECRETARY OF THE
NATIONAL ASSEMBLY
(Seal)

With three valid pages in conformity with its original, which were duly compared with it. Managua on the twenty third day of March of nineteen ninety three.

FRANCISCO J. DUARTE TAPIA
SECRETARY OF THE
NATIONAL ASSEMBLY
(Seal)

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 92-01408; 92-00925

TRANSPORTES AEREOS NACIONALES, S.A., a foreign corporation, and SERVICIO AEREO DE HONDURAS, S. A., a foreign corporation,

Appellants,

vs.

TANIA FLORES DE BRENES, individually and as Executor, Administrator, or Personal Representative of the Estate of ERICK ANTONIO BRENES, Decedent, for herself and on behalf of the Decedent's survivors; and CLAUDIA CROW, for herself and as Executor, Administrator or Personal Representative of the Estates of ALFONSO G. WONG-VALLE and MARIA WONG-VALLE, deceased, et al.,

Appellees.

_____/

MOTION FOR REHEARING

The appellees in case no. 92-00925, Tania Flores de Brenes, etc., et al., plaintiffs below, move the Court for

rehearing in this cause. As grounds therefor they would briefly and respectfully show:

Most respectfully, the Court reached the wrong result in this case, for several reasons. First and foremost, at the time that it decided the case, the Court did not have the benefit of an "official interpretation" of the law by the National Assembly of Nicaragua. That interpretation now exists, and it requires a different result. On March 24, 1993, in response to the panel's opinion in this case, the Nicaraguan National Assembly – which the defendants insisted was the only branch of the Nicaraguan government which had the constitutional authority to "officially interpret the law" – issued an official Resolution declaring that the law of Nicaragua *does* provide for the recovery of moral damages in cases like this one. For this reason, as well as the additional reasons which follow, the Court's opinion simply cannot stand as the last word on the subject. Second, the panel had no authority to overrule *Guelman v. de Guelman*, 453 So.2d 1159 (Fla. 3rd DCA 1984), as it did. Third, the Court misapprehended the nature and scope of the Nicaraguan Penal Code, as well as its meaning and applicability to this case. And fourth, the Court overlooked several things, including four provisions of the Nicaraguan Civil Code and Code of Civil Procedure which provided an explicit (and contrary) answer to the question presented in this case. Because of the tenor of the Chief Judge's questions and comments at oral argument, we recognize that we may have some difficulty in convincing the Court of its error. We do believe that the Court desires a correct result in this case, however, so all that we ask is a fair opportunity to make our points. We will be as brief as possible.

A. The intra-district conflict.

In deciding that *Guelman v. de Guelman*, 453 So.2d 1159 (Fla. 3rd DCA 1984), "is *neither a correct statement of the law* nor applicable to the question presented in this case" (slip opinion, p. 4, n. 2; emphasis supplied), the panel undeniably overruled a decision of a prior panel of this Court. As we explain in more detail in our motion for rehearing en banc, this panel had no authority to do that; only the en banc Court can do such a thing. In the interest of brevity, we will not reargue the point. Instead, the panel is referred to our motion for rehearing en banc, which we adopt and incorporate (in its entirety) here by reference. We respectfully submit that, at minimum, the panel should refer its open disagreement with *Guelman* to the en banc Court for rehearing of its decision.

B. The Nicaraguan National Assembly's Resolution.

Next, as the Court is certainly aware, it chose to give no weight whatsoever to the Nicaraguan Supreme Court's recent advisory opinion (or "consulta," as the defendants prefer to call it) on the subject, which is at odds with the panel's opinion in every particular. (To demonstrate that the two opinions are antithetical in every particular, we have set out their relevant portions side-by-side for comparison in a separate document which is attached to this motion.) Because the panel did not bother to explain why it chose to ignore the Nicaraguan Supreme Court's opinion, and because we are unwilling to assume that the panel felt it was more competent to decide the substance of the law of Nicaragua than that nation's highest Court, we can only

assume that the panel accepted one or both of the arguments which the defendants advanced in their reply brief in an effort to finesse the Supreme Court's opinion. We explain in our motion for rehearing en banc why the defendants' reliance upon the 1961 "consulta" of the Supreme Court provided no justification for ignoring the 1992 advisory opinion, and because we have incorporated that motion by reference here, we will not belabor the point. We also doubt that this was the reason why the panel declined to credit the opinion of the Nicaraguan Supreme Court in any event, so we will concentrate instead on the second ground which the defendants advanced in avoidance of the opinion.

According to the defendants, the Supreme Court's advisory opinion could legitimately be ignored here because, under Nicaragua's Constitution, the only branch of government given express authority to "officially interpret the law" is the National Assembly. Given the Chief Judge's comment at oral argument that this constitutional provision rendered the Nicaraguan Supreme Court an essentially meaningless institution where "interpretation" of Nicaraguan law is concerned, it is likely, we think, that the advisory opinion was ignored for this reason, and this reason alone. But whatever justification this constitutional provision may have supplied for the panel's determination to ignore the advisory opinion, most respectfully, that justification no longer exists. On the day that we were required to file this motion, and in response to the panel's opinion in this case, the National Assembly of Nicaragua issued an official Resolution declaring that the law of Nicaragua is correctly stated in the Supreme

Court's recent advisory opinion – and thus, that the interpretation of Nicaraguan law contained in the panel's opinion is wrong.[1]

The defendants cannot have it both ways here. They cannot ask the Court to ignore the Supreme Court's declaration of Nicaraguan law on the ground that only the National Assembly can interpret the law under Nicaragua's Constitution, and then ask the Court to ignore the National Assembly's official interpretation of the law as well, when that constitutionally permissible interpretation proves adverse to their position. Neither can the defendants escape this recent official interpretation of Nicaraguan law by resorting to the shibboleth that new matters cannot be raised for the first time in a motion for rehearing. Everything contained in the Resolution was argued in our appellees' brief in one form or another. And because the defendants have insisted (with apparent success) that opinions of the Nicaraguan Supreme Court are meaningless because only the Nicaraguan National Assembly can officially interpret the law, the Resolution issued less than 24 hours ago clearly must be treated in the same manner as the Court would treat an intervening decision of the Florida Supreme Court or United States Supreme Court while a motion for

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[1] Because this Resolution was issued on the last day available for filing this motion, only a "fax" copy of it is available for filing at the present time. A "fax" copy is therefore attached hereto. We will supplement this motion with a fully authenticated document and an appropriate English translation of it as soon as we possibly can. Pursuant to §§ 90.202 and 90.203, Fla. Stat. (1991), we respectfully request that the Court take judicial notice of the authenticated document when it is received.

rehearing is pending. In that circumstance, of course, rehearing is routinely granted to ensure that the final decision of the court conforms to the law announced in the intervening decision.[2]

In addition, now that the Court has ruled that the determination of foreign law presents a pure question of law, and that "appellate courts are not limited to matters raised by the parties, but are encouraged to take an active role in ascertaining foreign law" (slip opinion, p. 3), we do not see how the Court could legitimately ignore the Resolution of the National Assembly simply because it was issued a few days after the Court filed its now demonstrably erroneous opinion. Most respectfully, whatever justification there may have been for ignoring the Nicaraguan Supreme Court's advisory opinion on the subject, there can be no justification whatsoever for ignoring the Nicaraguan National Assembly's more recent Resolution on the subject – and we respectfully submit that the doctrine of comity (upon which we elaborate in our motion for rehearing en banc) simply requires the Court to follow the law announced in that recent Resolution.

C. Article 2509 of the Civil Code.

We turn now to the things which the Court misapprehended and overlooked in reaching its decision. First, we

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[2] *E.g., Hampton v. A. Duda & Sons, Inc.*, 511 So.2d 1104 (Fla. 5th DCA 1987). *See State v. Hospital District of Hardee County*, 201 So.2d 69 (Fla. 1967); *Jollie v. State*, 405 So.2d 418 (Fla. 1981). *Cf. Regan v. ITT Industrial Credit Co.*, 469 So.2d 1387 (Fla. 1st DCA 1984), *approved*, 487 So.2d 1047 (Fla. 1986).

will address the Court's "construction" of the phrase "repair it along with the harms" (or "redress it, with damages," in the plaintiffs' translation) in Article 2509 of the Nicaraguan Civil Code. The Court offered two reasons for interpreting this phrase narrowly, to include only pecuniary damages and to exclude moral damages. First, it purported to find an apparent compulsion for such a narrow construction in Article 1865 of the Nicaraguan Civil Code, which states "[i]ndemnification of damages includes not only the amount of the loss which has been suffered, but also that of the creditor's loss of profits. . . . "

Quite apart from the fact that the phrase "the amount of the loss" is no less general and all-embracing than the general phrase "repair it along with the harms," the Court overlooked the fact that Article 1865 has no applicability whatsoever to actions to recover damages for personal injuries and wrongful deaths caused by quasi-crimes, like the negligence action in issue here. Most respectfully, each and every Article in the Chapter of the Civil Code from which the Court extracted Article 1865 – from Article 1845 to 1866 – deals with claims for damages to property rights and for the recovery of debts; all of the historical notes accompanying these Articles refer to property rights and debts; and there is no reference in any of these notes to Article 2509. As a result, Article 1865 of the Civil Code should have been deemed simply irrelevant to the meaning of Article 2509.

The irrelevancy of Article 1865 to Article 2509 can be demonstrated in another way. In the Chapter preceding the Chapter in which Article 1865 appears, Article 1837 expressly states that civil obligations arising from punishable acts are regulated by the provisions of the Penal

Code, and Article 1838 expressly states that civil obligations arising from guilt or negligence not otherwise punishable by the law are regulated by the Chapter in the Civil Code governing crimes and quasi-crimes – the Chapter which includes Article 2509. Most respectfully, Artice 1865 deals with property rights and debts; it simply has no relevance to the issue presented in this appeal.

The Court also attempted to justify its narrow construction of Article 2509 by suggesting that, because it "was derived from [Article 1045 of] the Civil Code of Costa Rica, a jurisdiction that did not recognize moral damages" (slip opinion, p. 6), the Nicaraguan National Assembly must have meant Article 2509 to be limited to pecuniary damages. Most respectfully, the Court simply accepted the defendants' version of Costa Rican law on this point (which was based exclusively on a 1923 treatise, which was also the sole authority cited by the Court), and it overlooked Costa Rican law in the process.[3] The more modern view, adopted by the appellate courts

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[3] Curiously, the portion of the 1923 treatise on which the Court relied says nothing specific about Article 1045 of the Civil Code of Costa Rica. Moreover, the single sentence of it which the defendants bothered to translate for the Court (at A. 77) offers only the author's apparent opinion that "[i]ndemnification should compensate nothing more than patrimonial losses . . . because affection in not a thing that is in the commerce of men." Most respectfully, that 70 year-old statement of opinion by a single Costa Rican treatise writer is an *awfully* slender reed upon which to determine what the Nicaraguan National Assembly intended when it enacted Article 2509 – and frankly, we think our clients deserved a better explanation than this for the Court's determination to ignore the Nicaraguan Supreme Court's contrary opinion on the point.

of Costa Rica and touted by current commentators, is that Article 1045 of the Civil Code of Costa Rica (which has not changed since its enactment) *does* provide for the recovery of moral damages, even in civil cases not otherwise covered by the penal code. *See* Rosa Maria Abdelnour Granados, *La Responsabilidad Civil Derivada del Hecho Punible [The Civil Responsibility Arising from the Punishable Act]*, pp. 330-53 (1984).[4] For the convenience of the Court, a copy of the relevant pages from this treatise, together with an English translation of them, is provided in a separate appendix to this motion. Most respectfully, if the meaning of Article 2509 of the Civil Code of Nicaragua is to turn upon the meaning of Article 1045 of the Civil Code of Costa Rica, then the Court reached the wrong conclusion in this case.

D. Article 46 of the Penal Code.

We turn now to the Court's refusal to give effect to Article 46 of the Nicaraguan Penal Code, which is contained in Chapter VI of the Penal Code, entitled "Regulations to Determine Civil Liability," and which plainly and

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[4] The author is a Professor of the Free School of Law of the Autonomous University of Central America and of the School of Law of the University of Costa Rica. The treatise also observes that Article 1045 of the Costa Rican Civil Code (and therefore Article 2509 of the Nicaraguan Civil Code) derives from Article 1382 of the French Code of Napoleon, and that moral damages are recoverable in France under this provision. The treatise also explains that the view of Mr. Alberto Brenes Cordoba, upon which the Court relied, is no longer the accepted view in Costa Rica.

unambiguously provides for the recovery of both pecuniary and moral damages. If we read the Court's opinion correctly, it appears that the Court concluded that all civil actions to recover compensatory damages are ordinarily governed exclusively by the Civil Code, and that the civil liability provisions of the Penal Code are applicable only in cases in which a person has been convicted of a crime – that the moral damages authorized by Article 46 are in the nature of a punishment for a criminal offense, rather than compensation for the damages suffered by the victim of a crime or quasi-crime.

That is what the defendants argued here, of course, yet they failed to point the Court to a single word in any Nicaraguan Code which even arguably says such a thing. They also failed to acknowledge their own expert's admission at trial that, apart from Article 46 itself (which says no such thing), there is not a single piece of paper in Nicaragua which says such a thing (T. 181-83).[5] The *only* place in which such a version of Nicaraguan law appears

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[5] Despite their expert's concession to the contrary, the defendants attempted to construct such a provision here by quoting half a sentence contained in Article 52 of the Penal Code. As we demonstrated in our answer brief (at pages 32-33), however, the remainder of the sentence allows resort to a civil forum where the victim waives participation in a criminal proceeding. In any event, Article 52, on its face, says only that civil damages are recoverable from a convicted criminal defendant, and that requests for such damages should be made in a subsequent civil action, rather than in the criminal action; it contains no affirmative prohibition against the recovery of damages in a civil action where there has been no criminal conviction – and it therefore adds nothing to the defendant's expert's position (which is probably why he never mentioned it below).

is in the defendants' brief – and, most respectfully, in accepting that version uncritically here (despite its insistence upon bottoming the law of Nicaragua exclusively on the express language of its Codes), the Court has misapprehended the nature and scope of the Nicaraguan Penal Code, as well as its meaning and applicability to this case.

As we tried to explain to the Court in our answer brief, the Nicaraguan Penal Code is not exclusively a criminal code. It does govern crimes, to be sure, but it also governs quasi-crimes (or torts), and it governs civil actions to recover damages caused by both criminal and quasi-criminal conduct. And if the instant suit had been brought in Nicaragua, it would clearly have been governed by the Penal Code. It would have been governed by the Penal Code because, as we explained at pages 29-30 of our brief, Articles 3105 and 3106 of the Civil Code expressly provide that the owner of a common carrier is absolved of criminal sanctions for its employees' "infractions of laws" (or fiscal or police regulations), unless it is proven that the owner participated in the infraction; but the owner is *"always"* liable to pay "damages in conformance with the prescriptions of the Criminal Code." Therefore, with respect to the civil liability of a common carrier for damages arising out of "infractions of laws," the Penal Code is the governing Code. In their reply brief, the defendants attempted to avoid these provisions by arguing that, because of the "import" of Articles 3097 and 3098, Articles 3105 and 3106 do not apply to any common carrier which has a "permanent place of business." Most respectfully, this effort to finesse Articles 3105 and 3106 should have been

rejected out of hand here, because (as we noted at p. 30, fn. 16, of our brief, and as the Nicaraguan National Assembly explains in its recent Resolution) the General Law of Transportation of 1986 – specifically, Article 392 of the Nicaraguan Commercial Code – extended to all aviation companies, including the defendants, all of the pre-existing code provisions regulating mass transportation, including Articles 3105 and 3106. The defendants cannot contend to the contrary here, because their own expert *agreed* with the plaintiffs' expert on this point at trial (T. 191-92, 234-35).

The "law" which the defendants' agents violated in these cases – which is the "law" triggering Articles 3105 and 3106 – is Article 329 of the Penal Code, which makes it a punishable act to cause a transportation accident through "carelessness or negligence." This is a criminal provision for which the owner cannot be punished criminally (because of Articles 3105 and 3106), but it establishes the nature of the punishable act which gives rise to civil quasi-crime (or tort) liability under Article 10 of the Penal Code, which reads as follows:

> A quasicrime is established by the action or damaging omission by an agent of whose actions a person is liable by virtue of the civil relation between him and said agent, as determined by the law. Quasicrimes only result in civil liability.

In other words, when an agent commits a punishable act (like a violation of Article 329), the liability of the principal lies in tort under the Penal Code (which is also essentially what Article 3106 of the Civil Code says).

The defendants do not really dispute that their liability for damages as principals of their negligent agents would ordinarily lie under the Penal Code. What they have argued (and what the Court held) is that the acquittal of their agents in Honduras relieved them as principals of their obligation to pay either pecuniary damages or moral damages under Article 46 of the Penal Code, and remitted the plaintiffs to the purportedly more limited pecuniary damages provided by Article 2509 of the Civil Code. In making this argument, however, the defendants have pointed to no explicit provision in any Nicaraguan Code which says such a thing. In point of fact, however, there are four explicit provisions in the Nicaraguan Codes which deal with this subject – all of which, we respectfully submit, the Court overlooked in accepting the version of Nicaraguan law which the defendants created in their brief. It would appear that the Court overlooked them because we did not quote them in our brief. What we did instead was to quote selected discussions of the point from three decisions of the Nicaraguan Supreme Court which analyzed the provisions in detail, and then referred the Court to the remainder of the decisions for the details themselves. Apparently because of its conclusion that decisions of the Nicaraguan Supreme Court have no precedential value, the Court did not undertake that task. Before it allows its decision to become final, however, it simply must examine the pertinent provisions themselves.

The effect of *both* convictions *and* acquittals in criminal proceedings upon subsequent civil suits for damages is explicitly addressed in Title VI of the Nicaraguan Civil

Code, in the Chapter entitled "On Res Judicata," in Articles 2362 and 2363. In effect, these Articles say that verdicts in criminal cases, both convictions and acquittals, are to be given res judicata effect in subsequent civil actions brought *against the person tried for the crime*, in which redress is sought for damages caused by *the crime*, only in three enumerated particulars – and in no others:

> **Art. 2362.** The verdicts pronounced by courts of penal justice enjoy the authority of res judicata, in favor or against any person, indistinctively, and in an absolute manner, when such verdicts decide:
>
> 1. If the accused or indicted party who is charged for an act which constitutes an infraction of the criminal law, is or is not the perpetrator of such act.
>
> 2. If those acts are chargeable from a penal law point of view.
>
> 3. If such acts present the required characteristics for the application of one or another provision of such law.
>
> **Art. 2363.** The other resolutions of a verdict pronounced by a court of criminal justice, which are not comprehended in any of the three cases of the preceding article, shall not have the effect of res judicata before a civil court, unless the party affected participated in the criminal trial.

It is Article 2363 which explicitly rejects the conclusion reached by the Court in this case, so it bears rereading before proceeding.

The subject is also addressed in two Articles of the Code of Civil Procedure:[6]

> **Art. 1122.** In civil trials the verdicts rendered in criminal proceedings can be applied, if the defendant is convicted.
>
> **Art. 1123.** The verdicts which dismiss the charges or which order the final acquittal shall produce res judicata effect in civil matters, only if based on any of the following circumstances:
>
> 1. The existence or non-existence of the crime or quasi-crime that has been the subject matter of the proceedings. Cases in which the dismissal or the acquittal is based on the existence of exculpatory circumstances which excuse criminal responsibility are not comprehended under this paragraph.
>
> 2. The non-existence of any relation whatsoever between the person charged and the act which is being prosecuted, *without prejudice to the civil responsibility which may affect him for the acts of third parties or for damages resulting from accidents according to the provisions of the Civil Code;* and
>
> 3. The non-existence in the record of any indicia against the accused party, *in which case res judicata cannot be alleged except with respect to persons who participated in the criminal proceeding as principal or adjoining parties.*
>
> The dismissal or acquittal decisions in criminal matters relating to the guardians, executors,

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[6] The defendants quoted the first of these provisions in their reply brief (at p. 10, n. 10). The reason why the Court was not alerted to the second will become clear as we proceed.

> depositaries, treasurers, and other persons who have received valuables of movable property under any title that involves the obligation to return shall not produce any res judicata effects.

(Emphasis supplied).

Most respectfully, no res judicata effect of any sort arises from these provisions in the instant case because the defendants' agents were not acquitted of the crime of negligence by a Nicaraguan criminal court; they were acquitted only of culpable homicide, and then only by a Honduran court. And even if the defendants' agents had been acquitted of the *crime* of negligence by a Nicaraguan court, these provisions would provide no res judicata effect in a subsequent civil action against the *defendants* to redress the *quasi-crime* arising from the "punishable act" of negligence, because in Nicaragua, as in Florida, the defense of res judicata requires an identity of the cause of action. The point is discussed at length, in an analysis which is bottomed squarely upon the four Code provisions quoted above, in *Carazo Olivier v. Texaco Caribbean, Inc.*, April 2, 1968, Corte Suprema de Justicia, Nicar., Bol. Jud. 56 (A. 192; S.A. 51).[7] In that case, the Supreme Court *reversed* an intermediate appellate court which had agreed with the position asserted by the defendants here; held that an automobile driver's acquittal in a criminal action did not preclude the plaintiff from recovering against him in a corresponding civil, quasi-criminal (or tort) action;

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[7] Even if the Court should continue to consider the decisions of the Nicaraguan Supreme Court as unauthoritative on points of legal interpretation, it should at least read what that Court has had to say about the four Code provisions quoted above before making its own interpretation of them.

and ordered the defendant-driver to pay the plaintiff's damages.

In its discussion of the point, the Supreme Court noted that, in the absence of an intervention by the civil plaintiff in the criminal action, the criminal court only had jurisdiction to determine if the defendant had committed a criminal act, which required proof of intent by the defendant, or at least a clear ability to foresee the consequences of his actions; that the criminal court had no jurisdiction to pass upon the question of whether a quasi-crime (or tort) had been committed by an act of simple negligence; and that an acquittal in the criminal action, while res judicata in any subsequent civil action to recover damages for an alleged criminal act, could not be asserted as res judicata in a subsequent civil action to recover damages for a quasi-criminal (or tortious) act:

> . . . In conformity with Arts. 2362 and 2363 C., criminal judgments result in res judicata in civil cases only if the offended party intervened and, outside of that case, when it is ruled if the accused is the perpetrator of the action, if said charges are founded, from the point of view of the Criminal law, and if he presents the required characteristics for the application of specific provisions of that law. According to Arts. 1122 and 1123 Pr., condemnatory penal judgments always result in res judicata and the acquitting judgment or those of definite dismissal yield such results only in specific cases, one of those being, if said judgments are based on the non-existence of the crime or quasi-crime which is the subject of the trial, in such cases in which the acquittal or dismissal originate from the existence of circumstances which exempt from

> criminal liability not being understood as included in such circumstance. . . . From this stems the fact that restrictive courts of justice have to decide if an action is or is not premeditated and if it was perpetrated or not by gross negligence, but setting these aside, they cannot proceed with their review to decide if there existed any degree of guilt or if it concerns a case of an act of God, thus determining if a quasi-crime existed or not, in which case it would properly pertain to civil courts. . . . "[T]hus the accused is not liable for the criminal action and for this reason he obtains a dismissal, it is clear that this judgment produces a res judicata in the civil area to pursue indemnity for damages caused by this penal violation; but this does not mean that the liabilities for which the prisoner is liable, if the action is considered a quasi-crime cannot be pursued before those courts for repairing the damages caused. . . . In conformity with the forementioned this Supreme Court reaches the conclusion that the judgment passed by the Court [below] has violated Art. 2362 C. when it accepted the exemption of res judicata in the judgment passed on criminal matters offered by the defendant Mr. Espinoza Gutierrez, as it is not produced with regard to him and much less with regard to the other defendant party [the corporate employer of Mr. Espinoza Gutierrez].

(S.A. 55-56).

The same point is made in *Renato Vivas v. Esso Standard Oil Co.*, Aug. 7, 1949, Corte Suprema de Justicia, Nicar., Bol. Jud. 16293 (S.A. 61, 66). In that case, the driver of a tanker-truck owned by Esso Standard Oil was

acquitted of criminal responsibility for a vehicular accident which resulted in a death. The victim's legal representative thereafter brought a civil action for damages against Esso, which contended that the acquittal of its driver in the criminal action was res judicata on the issue of its liability in the civil action. The Supreme Court rejected this position, as follows:

> . . . It is true that the criminal act could include a civil claim when a damage results, which was performed with the intent to cause harm; if there was not such an intention, but there was a damage, it was then a quasi-crime; that is, there arises the obligation to repair only the damage; the action when referred to this, is decided before the Civil Courts and at the request of the injured party, whereas in a criminal case, the offender is judged by the Courts of this kind; now, according to what has just been said, the criminal act in many cases subjects the guilty party to a civil reparation; therefore, two actions result, one, which is public and the other private, which is very much like the claim for damages, has the same objective, but as it is accessory to the public action, it can be heard before the criminal court; and whatever these courts decide, in reference to the responsibility of the accused, will be res judicata in a Civil case, since the public interest that is typical of the criminal act, prevails over the private interest which extinguishes the capacity to prosecute for the damage caused by the criminal act; however, when this is strictly a civil crime, the action to pursue this damage must be brought before the civil courts; the restrictive courts of justice will not have proper jurisdiction to hear the case and to decide on this matter; and so it is

that if the accused is not liable for the criminal offense, an acquittal is obtained; it is obvious that this judgment will operate as res judicata in the civil jurisdiction to seek reparation for the damage caused by this criminal infraction; but this does not mean that the responsibility acquired by the defendant if the act committed constituted a quasi-crime, could not be pursued before the civil courts, in order to compensate the damage caused.

Aubry and Rau, on this subject, comment: "The criminal courts are not generally, besides the intervention of the aggrieved party, called to resolve on facts when these are not considered as being a criminal infraction, but, rather, they have the characteristics of a quasi-crime, when they have a legal repercussion of some kind in reference to a civil matter. Taking into account the nature of the institution of these Courts, its decisions leave intact the issue of knowing whether a civil crime or a quasi-crime has been committed; and later continue like this: "The resolutions of acquittal based on the fact that the action charged to the accused does not constitute a criminal act, cannot be invoked before the civil courts as res judicata in reference to the very existence of the fact, the restrictive courts of justice cannot decide as to the existence of a quasi-crime, since this is a civil matter." In the case sub-lite, the instruction followed before the First Local Criminal Court Judge, was according to the decree of the Court, to investigate the death of Mr. Vivas Lacayo, which occurred as a result of an accident, and for that reason, the investigation was directed against the driver who was driving the tanker truck, providing the evidence that was deemed proper to establish

> his criminal liability, resulting from said evidence that there was none so as to be able to charge him with a crime; this, of course, does not mean that the interested parties cannot, now, seek before the civil courts, the indemnity for the damage suffered as a result of the act of the driver, considered as a quasi-crime; that is, that even if the element of criminal intent is lacking in the commission of the act, in order for it to be considered a criminal act, the culpability could later be established due to negligence or imprudence, for the purposes of a civil crime; now then, the plaintiff did not appear in the criminal proceeding and what he now seeks is not the indemnity for the damage caused by the criminal act, but that he receive reparation for the damage that, according to him, was inflicted by the act of the driver, considered as a quasi-crime; and for that same reason in this case, the decision handed down in the criminal division does not have any influence on the civil trial; Art. 1123 Pr.

(S.A. 69-70). As we explained at page 35 of our answer brief, this decision also observes that, in cases (like the instant case) in which a principal is vicariously liable for the quasi-crimes of its agents, an acquittal of an agent in the underlying criminal action will have no res judicata effect in a subsequent civil action against the principal.

There is a third decision of the Supreme Court of Nicaragua which is also squarely on point: *Engracia Martinez v. Rafael Cabrera & Co., Ltd.*, Dec. 21, 1957, Corte Suprema de Justicia, Nicar., Bol. Jud. 18768 (S.A. 80). In that case, a child died in a movie theater fire. The owner of the movie theater was acquitted of criminal charges

arising out of the incident – and, relying upon Article 2362 of the Civil Code, he asserted the acquittal as a bar to a subsequent civil action for damages. The Supreme Court rejected the defense, as follows:

> . . . [T]he Supreme Court is of the opinion that Article 2362 C. is not applicable to the case, because there is no identity in the cause, which is a requirement to invoke the res judicata, because at the criminal trial, the prosecuted were released of any participation in the commission of a voluntary crime or by gross negligence, whereas in the civil trial now under consideration, we are dealing with a quasi-crime.
>
> It cannot be held, as the attorney for the appellants contends, that the quasi-crime always involves gross negligence. The restrictive Justice Courts have, to the exclusion of any other jurisdiction, the obligation to decide whether the accused or denounced individual is the perpetrator of the acts with which he is charged, as constituting a transgression of criminal law, if said acts are imputable from the standpoint of criminal law and finally, if these acts present the characteristics that are required for the application of this or that disposition of that law; Criminal Courts are not called to decide upon acts that do not represent infringement of the criminal law, but instead, constitute a quasi-crime (Aubry Et Rau V. 3 p. 406 – French Edition). According to the purpose and nature of these courts they do not decide whether or not a quasi-crime has been committed, or whether the facts that are imputed to the prosecuted are imputable because of the civil consequence that can derive, and whether these charges can or

> can not give place to the reparation of the damage. The same authors mentioned above, Aubry and Rau, in their comments in these matters state: The judgment that acquits any person of the accusation of homicide, even involuntary, is not an obstacle for the admission of a claim for damages and interests formulated against him in view of the facts that constituted the basis of his criminal trial, but that are not considered any more except as constituting a simple crime of civil law or a quasi-crime in the sense of Article 1382 et al., "in support of their argument Aubry Et Rau cited a long list of writers and numerous decisions of the French Courts. From the abovementioned statements, it is deduced that the Court [below] acted rightfully by not applying article 2362 C. to the case in question and ascertaining that the acquittal in a criminal procedure does not operate as res judicata in a civil trial for the redress of the damage caused by a quasi-crime.

(S.A. 85).

When undersigned counsel brought these decisions to the Court's attention at oral argument, the Chief Judge asked if any of them awarded moral damages under the Penal Code – and when undersigned counsel answered "no," the decisions were apparently dismissed by the Court as irrelevant. The reason that these cases do not go on to discuss the issue presented here, however, is that they were all decided before the 1974 enactment of Article 46 of the Penal Code. In addition, the issue presented here was simply not raised by the parties for decision. We also think the question missed the point. What these decisions demonstrate is that the acquittal of an agent in

a criminal action does *not* give rise to the type of pseudo-defense claimed by the defendants here (which is nowhere stated in the Nicaraguan Codes) – that the principal of a negligent agent acquitted of a crime is liable for pecuniary damages only under the Civil Code, and not liable for pecuniary and moral damages under the Penal Code.

What these decisions (and the Code provisions which they explain) *do* demonstrate is that the acquittal of an agent in a criminal action can give rise to a defense (at best, and in only limited circumstances) *on the issue of liability*, and on that issue alone, in a subsequent civil suit to recover damages for the commission of *the crime*. These decisions (and the Code provisions which they explain) also demonstrate beyond any doubt here that the acquittal of the defendants' agents on charges of culpable homicide in Honduras provides no defense of any kind whatsoever in this subsequent civil action to recover damages for the defendants' *quasi-criminal* conduct under the Penal Code. And because (as we have previously demonstrated in our discussion of Article 3106 of the Civil Code), the defendants are liable in this case "for indemnification of the damages in conformance with the prescriptions of the *Criminal Code*," the plaintiffs were entitled to the damages specified in Article 46 of that Code – both pecuniary and moral.

Most respectfully, the Court has been misled by the defendants into inventing a partial res judicata defense on the issue of damages which nowhere exists in the Nicaraguan Codes. The damages available to the plaintiffs under Article 46 of the Nicaraguan Penal Code *are* available to them here, notwithstanding the acquittal of

the defendants' agents of culpable homicide in Honduras, because Article 2363 of the Civil Code says exactly that. Both the Nicaraguan Supreme Court and the Nicaraguan National Assembly have also said exactly that – and we respectfully urge the Court to grant us a rehearing, and to conform its decision to the law of Nicaragua, as that law has been announced by both of those clearly competent institutions.

E. The plaintiffs' due process rights.

Finally, we must also respectfully insist that the panel's opinion violates the plaintiffs' due process rights under the United States Constitution. As the defendants themselves pointed out in their initial brief, a state court violates a litigant's due process rights under the Fourteenth Amendment when its construction of foreign law "contradict[s] the 'clearly established' law" of the foreign jurisdiction and such law "has been brought to the court's attention." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 731, 108 S. Ct. 2117, 2126, 100 L. Ed.2d 743, 758 (1988). *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed.2d 628 (1985); *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 101 S. Ct. 633, 66 L. Ed.2d 521 (1981).

In the instant case, the law of Nicaragua is clearly established by the provisions of the Nicaraguan legal codes, by a recent advisory opinion of the Nicaraguan Supreme Court, and by a recent Resolution of the Nicaraguan National Assembly; all of that law was brought to the Court's attention at one point or another during the course of this proceeding; and the conclusion reached in the panel's opinion plainly contradicts that

law in every particular. Most respectfully, the fundamental notions of fairness which lie at the heart of the due process clause simply require a thorough reconsideration of the panel's opinion before it is permitted to stand as the last word on the subject by this Court. We earnestly implore the Court to grant us that relief. We would also welcome an opportunity to reargue the case to the panel if it should be inclined to hear oral argument on this motion.

[Service list omitted].

Respectfully submitted,

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By: _____
JOEL D. EATON
Fla. Bar No. 203513

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 92-01408; 92-00925

TRANSPORTES AEREOS NACIONALES, S.A., a foreign corporation, and SERVICIO AEREO DE HONDURAS, S. A., a foreign corporation,

Appellants,

vs.

TANIA FLORES DE BRENES, individually and as Executor, Administrator, or Personal Representative of the Estate of ERICK ANTONIO BRENES, Decedent, for herself and on behalf of the Decedent's survivors; and CLAUDIA CROW, for herself and as Executor, Administrator or Personal Representative of the Estates of ALFONSO G. WONG-VALLE and MARIA WONG-VALLE, deceased, et al.,

Appellees.

_____/

MOTION FOR REHEARING EN BANC

The appellees in case no. 92-00925, Tania Flores de Brenes, etc., et al., plaintiffs below, move the Court for rehearing en banc in this cause. As grounds therefor they would respectfully show:

The issue presented in this appeal – which is common to 34 different wrongful death cases filed below, and which therefore affects scores of persons – is whether the law of Nicaragua provides for the recovery of intangible damages by a decedent's survivors in aviation disaster/

wrongful death cases, as the law of Florida does. After hearing extensive expert testimony on the subject, the trial court ruled that Nicaraguan law is consistent with Florida law on this point. Less than six months ago, the Supreme Court of Nicaragua issued an advisory opinion declaring that the law of Nicaragua provides for the recovery of intangible damages in cases like this one. By a vote of 9-0, the Justices declared (1) that both economic and intangible damages are recoverable under the general damage provision of the Civil Code of Nicaragua, Article 2509; (2) that, in accidents involving public transportation, both economic and intangible damages are recoverable under Articles 46 and 48 of the Penal Code of Nicaragua, which deal with civil liability for both crimes and "quasi-crimes" (or torts); and (3) that the acquittal of an agent in a criminal action does not relieve the principal from civil liability in an action to redress a quasi-crime, and that intangible damages are recoverable in such an action under these provisions of the penal code.[1]

Two weeks ago, after an oral argument in which undersigned counsel was given very little opportunity to argue his clients' full position, a panel of this Court

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[1] For the convenience of the Court, a copy of the Nicaraguan Supreme Court's opinion, in both Spanish and English, is attached hereto. As we explained in detail in the "Notice of Supplemental Authority and Request to Take Judicial Notice" (and the supplement thereto) by which we brought this opinion to the Court's attention, the issuance of such an opinion (or "consulta," as the defendants prefer to call it) is a legitimate function of the Nicaraguan Supreme Court, and the defendants challenged neither the authenticity nor the legitimacy of the opinion in their response.

reversed the trial court's determination that intangible damages are recoverable under Nicaraguan law. It held (1) that intangible damages are *not* recoverable under Article 2509 of the Civil Code of Nicaragua; (2) that the Penal Code of Nicaragua provides for the recovery of intangible damages *only* from a person who has been convicted of a crime; and (3) that the acquittal of an agent *relieves* the principal of civil liability for intangible damages under the Penal Code. Remarkably, the panel did not even mention the existence of the Nicaraguan Supreme Court's recent advisory opinion, much less explain why it felt it was competent to decide the substance of Nicaraguan law in a manner squarely contrary to each and every point in that opinion. And if that were not remarkable enough, before it could reach the conclusion it did, the panel had to overrule a decision (which stood squarely in its way, and which simply required that the trial court be affirmed) rendered less than 10 years ago by another panel of this Court.[2]

Less than 24 hours ago, in response to the panel's opinion in this case, the National Assembly of Nicaragua issued an official Resolution declaring that the law of Nicaragua is correctly stated in the Nicaraguan Supreme Court's recent advisory opinion – and thus, that the interpretation of Nicaraguan law contained in the panel's opinion is wrong.[3] Most respectfully, the panel's conclusion that the law of Nicaragua *disallows* what both the

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[2] For the convenience of the Court, a copy of both the panel's opinion and the conflicting decision is attached hereto.

[3] Because this Resolution was issued on the last day available for filing this motion, only a "fax" copy of it is available for filing at the present time. A "fax" copy is therefore attached

Nicaraguan Supreme Court and the Nicaraguan National Assembly say it plainly *does allow* is a conclusion of obviously exceptional importance. The panel's determination to overrule a decision of a prior panel of this Court in order to enable it to reach that upside-down conclusion also creates a stark intra-district conflict. And both of these rulings, in our judgment, simply cry out for reconsideration by the en banc Court. Indeed, if there were any purpose at all in enacting Rule 9.331, this is the paradigm for which the Rule must have been intended.

A. The intra-district conflict.

[Discussion omitted].

B. The question of exceptional importance.

This Court also has jurisdiction to rehear a case en banc if it presents a question of "exceptional importance."[4] Because this Court sits in the "hub of the Americas," it is frequently called upon to decide the law of

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hereto. We will supplement this motion with a fully authenticated document and an appropriate English translation of it as soon as we possibly can. Pursuant to §§ 90.202 and 90.203, Fla. Stat. (1991), we respectfully request that the Court take judicial notice of the authenticated document when it is received.

[4] The First District has recently ventured a definition of this phrase to include "(1) cases that may affect large numbers of persons, and (2) cases that interpret fundamental legal or constitutional rights." *In Interest of D.J.S.*, 563 So.2d 655, 657 n.2 (Fla. 1st DCA 1990). Because the panel's opinion affects 34 wrongful death cases involving scores of persons, the first criterion is clearly satisfied here. For reasons which will appear in the argument which follows, the second criterion is clearly satisfied here as well.

Latin American countries. To date at least, it was bound in that task by the settled principles of the doctrine of comity:

> Bouvier defines comity as the practice by which one court follows the decisions of another court on a like question, though not bound by the law of precedents to do so. In Hilton v. Guyot, 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95, the Supreme Court of the United States defined comity as neither a matter of absolute obligation, nor of mere courtesy and goodwill, but it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of the laws.
>
> . . . [T]he rules of comity may not be departed from, unless in certain cases for the purpose of necessary protection of our own citizens, or of enforcing some paramount rule of public policy. . . .

Herron v. Passailaigue, 92 Fla. 818, 110 So. 539, 542 (1926). *Accord Beverly Beach Properties, Inc. v. Nelson*, 68 So.2d 604, 609, 41 A.L.R.2d 1071 (Fla. 1953) ("The rules of comity may not be departed from, unless in certain cases for the purpose of necessary protection of our own citizens, or of enforcing some paramount rules of public policy."), *cert. denied*, 348 U.S. 816, 75 S. Ct. 27, 99 L. Ed. 643 (1954); *Belle Island Investment Co., Ltd. v. Feingold*, 453 So.2d 1143, 1145 (Fla. 3rd DCA) ("In Florida, the rules of comity may not be departed from except to protect the citizens of our

state or some paramount public policy."), *review dismissed*, 459 So.2d 1039 (Fla. 1984). *See Metropolitan Investment Corp. v. Buchler*, 575 So.2d 262 (Fla. 3rd DCA 1991).

Neither of these two exceptions to the "rules of comity" which "may not be departed from" exist in the instant case. There are no Florida citizens involved in this case who need the protection of this Court from Nicaraguan law. The defendants are Honduran corporations, and the numerous plaintiffs and beneficiaries deprived of their damages by the panel's opinion are Nicaraguan citizens (most of whom live in Nicaragua, some of whom live in Florida) seeking application of their own law. Neither is there any paramount rule of public policy which needs to be enforced at the expense of Nicaraguan law here, because Florida law plainly provides for precisely the type of recovery which the panel has denied our Nicaraguan clients by its opinion. The doctrine of comity therefore required the panel to follow the law as plainly stated by the highest Court in Nicaragua – a Court which was *obviously* far better situated and much more competent to determine the law of Nicaragua than any panel of this English-speaking Court (with no access to Nicaraguan law other than the argumentative versions submitted to it by the parties) could ever hope to be. The panel simply ignored the Nicaraguan Supreme Court's recent advisory opinion on the subject, however – and announced several conclusions exactly contrary to that Court's undeniably expert explanation of Nicaraguan law.

The two opinions speak very well for themselves on the point of their inherent conflict, as a simple side-by-side comparison will reveal:

The Nicaraguan Supreme Court's Opinion	The panel's opinion
In Articles 2509 and the subsequent, the Civil Code of Nicaragua establishes civil liability for damages in their entirety, without exclusion. Meaning that it covers property damages as well as moral damages. The law has no provision on damage issues limiting it to property damages exclusively, wherein moral damages are excluded. To elaborate on this subject, refer to judgment date 8-12-1965, case Burgos Chamorro vs. Ferrocarril del Pacifico de Nicaragua.	No provision of the civil code provides for the recovery of moral damages. Appellees rely on Article 2509, the basic civil-code provision dealing with the indemnification of damages and losses. According to Article 2509, "[e]very one who by intentional misconduct, fault, negligence or imprudence, or by a malicious act causes injury to another is obligated to repair it along with the harms." It is the appellees' contention that because Article 2509 does not differentiate between compensatory and moral damages, moral damages are implicitly recoverable. That argument, however, ignores the civil-code prohibition against presuming legal obligations not expressly set forth under the code. Article 2509 does not mention moral damages; it provides only for the compensation of pecuniary loss.

In the chapter referring to crimes and quasi crimes, the Nicaraguan Civil Code establishes civil liability for damages caused by punishable acts, and in Article 3106 C. [Civil] it mentions that in an accident involving public transporation, [sic] civil liability will always abide by the Criminal Code. Article 2 of the Criminal Code describes as punishable an act punished by law, caused by negligence, unskill, negligence or violation of laws or regulations; and that any person criminally liable has civil liabilities also. (Article 34 Pn. [Penal]). The Criminal Code of Nicaragua, in the Chapter on Rules to determine Civil Liability, Article 46, stipulates on the payment of property and moral damages caused by a punishable act. Dependent parties may file claims for property and moral damages pursuant to Articles 46 and 48 Pn. Article 10 Pn. indicates that a damaging act or omission of an agent for whose actions a person is responsibile [sic] by virtue of a civil relationship

Because the flight crew was acquitted of all criminal charges in connection with the plane crash, plaintiffs' claims are governed by the civil code. . . . Although the Nicaraguan legislature enacted a new penal code in 1974 which expressly provided for an award of moral damages after a criminal conviction, Article 2509, the Civil Code, was not amended to provide recovery for such damages.

> binding him/her to such agent, constitutes a quasi crime. Civil liability proceeding from a quasi crime is not annulled as [a consequence] of a dismissal of the criminal liability of the agent. Said civil liability allows for charges on property and moral damages as well. Refer to Engracia Martinez vs. Rafael Cabrera & Co., judgment date 12/21/1957; Vivas vs. Esso Standard Oil, judgment date 8-17-1949; Cuadra Mendoza vs. Camilo Barberna deShon & Co., judgment date 12-9-1969.

Most respectfully, that the panel read Nicaraguan law exactly contrary to the manner in which the Nicaraguan Supreme Court stated it is simply beyond debate here.[5]

Because the panel did not bother to explain why it chose to ignore the Nicaraguan Supreme Court's opinion, we can only assume that it accepted one or both of the arguments which the defendants advanced in their reply

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[5] A more appropriate translation of Article 2509 is "Anyone who, by fraud, failure, negligence or imprudence or through a malicious act causes injury to another is obliged to redress it, with damages." That translation obviously draws no distinction whatsoever between pecuniary damages and moral damages. In any event, the translation used by the panel also draws no such distinction.

brief in an effort to avoid the opinion. First, the defendants argued that, according to a 1961 "consulta" of the Nicaraguan Supreme Court, the issuance of "consultas" (like the recent advisory opinion in issue here) was not one of its functions and was disfavored and therefore "restricted." Although we fail to see the relevance of this point, since the Supreme Court actually issued the "consulta" in issue here in 1992, the fact remains that the substance of the 1961 "consulta" was not fairly represented to the panel in the defendants' reply brief (and was misrepresented at oral argument).

The 1961 "consulta" (which can be found in English translation at page A244 of the Appendix to Reply Brief of Appellants) does tell an inquiring *attorney* that "consultas" requested by attorneys and individuals are disfavored and restricted, but it also plainly states that "Inquiries that come from government authorities and officials shall be answered, unless they pertain to cases that may eventually be heard by the High Court. Judges may also present inquiries to their superiors, and this would be more appropriate." The 1992 "consulta" which the panel ignored in the instant case was issued in response to an inquiry by a judge. The 1961 "consulta" therefore provided no reason whatsoever for the panel to refuse to honor the doctrine of comity with respect to the 1992 advisory opinion with which it chose to disagree in every particular.

The defendants also argued that the Supreme Court's advisory opinion could legitimately be ignored because, under Nicaragua's Constitution, the only branch of government given express authority to "officially interpret the law" is the National Assembly. By that reasoning, of

course, the instant case cannot be decided by *any* court, including this one. If only the National Assembly can interpret the law, then this Court certainly has no authority to do so; and if this Court *does* have authority to do so, then the unanimous Justices of the Nicaraguan Supreme Court have a hundred times *more* authority on a question of Nicaraguan law. Even if the Nicaraguan Supreme Court's opinion is "only" advisory – just as, in the identical sense, the panel's opinion can "only" be advisory – it is unquestionably more compelling on an issue of Nicaraguan law than any opinion of this Court could be. And it is precisely for such reasons that the doctrine of comity was created.

In any event, the more important point here is that, whatever justification this constitutional provision may have supplied for the panel's determination to ignore the Supreme Court's explanation of Nicaraguan law, that justification no longer exists. The National Assembly has now "officially interpreted" the law, and that interpretation is consistent in every particular with the Supreme Court's prior explanation of Nicaraguan law. And because the Constitution of Nicaragua expressly confers that power upon the National Assembly, there can be *no* justification for any further refusal to honor the doctrine of comity in the instant case.

We also respectfully insist that the panel's interpretation of Nicaraguan law was simply wrong. The trial court's reading of Nicaraguan law was supported not merely by expert testimony and a recent advisory opinion of the Nicaraguan Supreme Court (and now, by a Resolution of the Nicaraguan National Assembly), but by several prior decisions of the Nicaraguan Supreme Court

(some of which were cited in the Supreme Court's advisory opinion itself). The trial court's ruling on Nicaraguan law was also squarely supported by the published treatises of Nicaragua's two leading legal commentators. The panel also elected to ignore all of these additional authorities on the point, notwithstanding that the defendants provided it with *no* comparable authority to the contrary. This is not the place to quarrel with the panel's opinion, however. We mention these things simply to underscore the compelling need for the en banc Court to take a hard look at the panel's opinion before it is permitted to become the final word of this Court. For our quarrel with the panel itself, we refer the Court to our motion for rehearing – which we adopt and incorporate here by reference.

Finally, we must also respectfully insist that the panel's opinion violates the plaintiffs' due process rights under the United States Constitution. As the defendants themselves pointed out in their initial brief, a state court violates a litigant's due process rights under the Fourteenth Amendment when its construction of foreign law "contradict[s] the 'clearly established' law" of the foreign jurisdiction and such law "has been brought to the court's attention." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 731, 108 S. Ct. 2117, 2126, 100 L. Ed.2d 743, 758 (1988). *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed.2d 628 (1985); *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 101 S. Ct. 633, 66 L. Ed.2d 521 (1981).

In the instant case, the law of Nicaragua is clearly established by the provisions of the Nicaraguan legal codes, by a recent advisory opinion of the Nicaraguan Supreme Court, and by a recent Resolution of the

Nicaraguan National Assembly; all of that law was brought to the Court's attention at one point or another during the course of this proceeding; and the conclusion reached in the panel's opinion plainly contradicts that law in every particular. Most respectfully, the fundamental notions of fairness which lie at the heart of the due process clause simply require a thorough reconsideration of the panel's opinion by the en banc Court before that opinion is permitted to stand as the last word on the subject by this Court. We earnestly implore the Court to grant us that relief.

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance. I also express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of this Court, and that a consideration by the full Court is necessary to maintain uniformity of decisions in this Court: *Guelman v. de Guelman*, 453 So.2d 1159 (Fla. 3rd DCA 1984).

[Service list omitted].

Respectfully submitted,

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By: /s/ _____
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Fla. Bar No. 203513

[TRANSLATION]

MINISTRY OF
FOREIGN RELATIONS
Managua, Nicaragua

No. 940285 March 23, 1994

HIS EXCELLENCY,
MR. JOHN MAISTO
AMBASSADOR OF THE UNITED STATES OF AMERICA
CITY (MANAGUA)

Mr. Ambassador:

I have the honor to address Your Excellency again in reference to the claim filed by 32 Nicaraguan families (mentioned in Note No. 930197 of February 9, 1994), members of which died in an airplane accident at Cerro de Hule in the Republic of Honduras, on October 21, 1989 during a flight on TAN/SAHSA Airline headquartered in Miami. Said claim was filed at the III District Court of Appeals of the State of Florida, and recently the Florida State Supreme Court denied a motion for review, declining to accept jurisdiction on the case per a Resolution of February 11, 1994, attached for your easy reference.

In regard to this regrettable accident, I wish to inform you that in June, 1990, the above-mentioned Airline, TAN/SAHSA, admitted its responsibility for negligence and offered to indemnify the surviving family members for damages and liability. In September 1991 the corresponding Court set Miami as the place of jurisdiction for damage and liability claims. Later, in May 1992, the first preliminary case for determining amounts of damages and liability was filed at the Dade County 11th Court of Appeals, including both material damages and damages

for pain and suffering. At this stage of proceedings, the latter Court found in favor of the Nicaraguan plaintiffs, in that such damages, both material and moral, are payable by Nicaraguan law. Under these circumstances some claims were partially formalized, both judicially and out of court.

The III District Court of Appeals of Florida State revoked this sentence and later denied a Motion for Review by the plaintiffs, followed by the State Supreme Court in similar fashion, as indicated, without having analyzed the arguments presented on points of Nicaraguan Law, and based on a Consultive Opinion of the Supreme Court of Justice and an Interpretative Law of Nicaragua's National Assembly, contravening legal opinions from two State Powers of Nicaragua, with which the Executive branch agrees. I attach these documents for your reference.

Thus, the resolutions issued by these High Tribunals of the State of Florida are contrary to the norms established by Nicaraguan Legislation, erroneously replacing the interpretative functions of these laws, both the Judicial and the Legislative Branches of the Republic of Nicaragua, upon giving them a different interpretation from that which has been stipulated by both Branches of Nicaraguan State Powers.

This refusal deprives the Nicaraguan plaintiffs of the right to fair and appropriate legal process, despite the fact that the Dade County Circuit Court found in favor of the said plaintiffs after an evidential hearing and the expert testimony of an Ex-President of the Supreme Court of Justice in Nicaragua.

In the light of this situation, I am honored to request of Your Excellency, that you present to your illustrious Government, that based on principles of international courtesy and in accordance with international law, the legislation of your country permitting, and in support of a Petition for Writ of Certiorari currently being processed, presented in representation of 32 Nicaraguan families, that the Attorney General of the United States of America present a Motion to the Honorable Supreme Court of the United States of America supporting the Motion by the Attorney General of Justice in Nicaragua, so that the said High Tribunal will hear the case and accept the Motion of the Attorney General of Justice in Nicaragua to appear and intervene in this process as State's Attorney. As an alternative, we respectfully request that the Motion be submitted to the Honorable Supreme Court of Justice so that he may appear and intervene as Amicus Curiae in support of the Nicaraguan plaintiffs.

I am also honored to reiterate, through your worthy intervention, to your illustrious Government, the support of the Attorney General of the United States of America, so that the Honorable Supreme Court of your country may hear this important case that affects the relatives of the victims of this tragic accident, involving fundamental constitutional rights and basic principles of international law, as well as courtesy between States (Comity).

Upon presenting to Your Excellency this request which is based on the excellent relations existing between our people and our Governments, I wish to take advantage of

this opportunity to express to Your Excellency my highest and most dignified consideration.

[SIGNED]
JOSE BERNARD PALLAIS
Minister of Foreign Relations
by Law

[STAMP:]

MINISTRY OF FOREIGN
RELATIONS
Managua